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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TEVRA BRANDS, LLC,

Plaintiff,

v.

BAYER HEALTHCARE LLC, and
BAYER ANIMAL HEALTH GmbH,

Defendants.

Case No. 3:19-cv-04312-BLF

**SECOND AMENDED COMPLAINT FOR
ANTITRUST VIOLATIONS OF THE
SHERMAN ACT § 2 (MAINTENANCE
OF A MONOPOLY), THE SHERMAN
ACT § 1 (EXCLUSIVE DEALING) AND
THE CLAYTON ACT §3 (EXCLUSIVE
DEALING)**

DEMAND FOR JURY TRIAL

Judge: Honorable Beth Labson Freeman

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1 Plaintiff Tevra Brands, LLC (“Tevra”), by its undersigned counsel, complains against
 2 Defendants Bayer Healthcare LLC (“BHC LLC”), and Bayer Animal Health GmbH (“BAH
 3 GmbH”) for violations of the Sherman Act §§ 1 and 2 (maintenance of a monopoly and
 4 exclusive dealing) and the Clayton Act § 3 (exclusive dealing). BAH GmbH and BHC LLC will
 5 be referred to collectively as “Bayer,” unless the context requires differentiating the two
 6 companies.

7 Plaintiff has significantly reduced its claims from those alleged in the First Amended
 8 Complaint. First, this Second Amended Complaint uses a much broader definition of the
 9 relevant market that includes all sales of Imidicloprid topicals in the U.S., and reduces the
 10 percentage of sales from which the plaintiff was foreclosed to 56%, based on this updated market
 11 definition. Second, this Second Amended Complaint does not include claims against Bayer AG,
 12 nor does it include claims for Sherman Act and Clayton act violations arising from tying or a
 13 hub-and-spoke conspiracy.

14 **NATURE OF ACTION**

15 1. Plaintiff Tevra Brands, LLC (“Tevra”) competes with Defendants BHC LLC and
 16 BAH GmbH (collectively “Bayer”) by producing more effective generic alternatives to Bayer’s
 17 Advantage and Advantix products, which it offers for sale at much lower prices. As set forth
 18 below, Bayer’s illegal maintenance of monopoly and illegal exclusive dealing have substantially
 19 foreclosed competition from Tevra and other generic manufacturers, excluding Tevra from a
 20 substantial share of the relevant market, resulting in higher prices and fewer choices for buyers in
 21 the relevant market.

22 2. Tevra was, and continues to be, damaged by a reduction in competition caused by
 23 Bayer’s violations of the Sherman Act and the Clayton Act, including Bayer’s monopolization
 24 and illegal exclusive dealing in the sale of “squeeze-on” Imidacloprid topical flea and tick
 25 treatments for dogs and cats (“Imidacloprid topicals”), which are purchased by retailers,
 26 distributors, veterinarians, and consumers throughout the United States. Bayer’s brands of
 27 Imidacloprid topical include Advantage and Advantix, which have been sold with various brand
 28 names in the U.S. for approximately 20 years.

3. Tevra makes generic Imidacloprid topicals that are lower priced and more effective than the name brand Advantage and Advantix flea and tick treatments made by Bayer. For example, in 2017, Bayer sold 6-dose Advantix II to Chewy.com for [REDACTED] per unit, before applying discounts and rebates. After applying the discounts and rebates of [REDACTED] under the agreement between Bayer and Chewy.com, the buyer still paid approximately [REDACTED] per unit in 2017. That same year, Tevra offered to sell a 6-dose generic of Advantix II to Chewy.com for [REDACTED] which is approximately [REDACTED] less expensive than Bayer's brand-name product, and approximately [REDACTED] less expensive after applying all of Bayer's discounts and rebates. Despite the fact that Tevra's generic Imidacloprid topicals are significantly less expensive and more effective than Bayer's Imidacloprid topicals, Chewy.com and other retailers did not purchase Tevra's generic Imidacloprid topicals. This is due to Bayer's anti-competitive conduct, through which Bayer has maintained its monopoly in the market for Imidacloprid topicals, substantially foreclosed generics like Tevra's from the market, and ensured that both retailers and consumers pay supra-competitive prices.

4. Bayer made approximately 85% of all sales in the relevant market during 2018 and received patent license royalties for most of the other 15%. To maintain its monopoly, and to stop Tevra and other makers of generic flea and tick treatments from competing against its Advantage and Advantix brands, Bayer carried out four different strategies to block generic competition:

- a. As described in Section E.1, below, a "2nd Brand Strategy" led by BAH GmbH, that included packaging a Bayer product to appear that it was generic, and using it to fill shelf space that would otherwise have been available for generic competitors,
- b. As described in Section E.2, a verbal "no generics" agreement with retailers, under which retailers would agree not to sell generic competitors to Bayer's product, in exchange for monetary compensation,
- c. As described in Section E.3, direct payments to a retailer to have a generic competitor removed from its shelves, and

d. As described in Section E.4, changes to its contracts with retailers to punish those who carried generic competitors to Bayer's products, and reward those who did not with discounts, growth bonuses, and trade funds.

5. As a result of Bayer's conduct, generic Imidacloprid topical manufacturers, including Tevra, were, and continue to be, substantially foreclosed from entering the market for Imidacloprid topicals in competition with Bayer's name-brand products Advantage and Advantix. The exclusion of generic Imidacloprid topicals from the market has resulted in substantially less competition, higher prices, and fewer product choices for retailers, distributors, and consumers.

PARTIES

6. Plaintiff Tevra is a Nebraska limited liability company, with its headquarters in Omaha, Nebraska. Tevra was founded in 2015 by a group of six veterans of the pet products industry. Prior to founding Tevra, they had acquired a tremendous depth and breadth of experience with flea and tick treatments, having worked at Sergeant's Pet Care Products, Perrigo, Bayer Animal Health, and other leading companies in the industry.

7. Defendant Bayer HealthCare LLC ("BHC LLC") is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business at 100 Bayer Blvd., Whippany, NJ 07981. BHC LLC is a wholly owned subsidiary of Bayer AG. Bayer Animal Health was a division of BHC LLC with its principal place of business at 12809 Shawnee Mission Parkway, Shawnee, Kansas. The business of BHC LLC relevant to this action was operated by its division Bayer Animal Health. This division should not be confused with Defendant Bayer Animal Health GmbH, described below. In 2020, Bayer AG completed the sale of its animal health assets, including the Bayer Animal Health division of BHC LLC, to Elanco Animal Health, Inc.

8. Defendant Bayer Animal Health GmbH ("BAH GmbH") is a corporation organized and existing under the laws of Germany, with a place of business at Kaiser-Wilhelm-Allee 50, 51373 Leverkusen, Germany. BAH GmbH is a wholly owned subsidiary of Bayer AG. Defendant BAH GmbH should not be confused with the Bayer Animal Health division of

1 Defendant BHC LLC, described above.

2 9. BAH GmbH and BHC LLC are affiliated companies under common control. BHC
3 LLC licenses a patent described in this Complaint from BAH GmbH, and these two companies,
4 under the common control of Bayer AG, are jointly engaged in research, development and
5 marketing of the Bayer products described in this complaint. BAH GmbH and BHC LLC will
6 be referred to collectively as “Bayer,” unless the context requires differentiating the two
7 companies.

8 **JURISDICTION AND VENUE**

9 10. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a),
10 because this action arises under Sections 3, 4 and 16 of the Clayton Act, 15 U.S.C. §§ 14, 15 and
11 26, as well as Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

12 11. This Court has personal jurisdiction over each of the defendants, pursuant to
13 Section 12 of the Clayton Act, 15 U.S.C. § 22, because Defendants may be found and transact
14 business in the State of California. This Court also has personal jurisdiction over each defendant
15 because, inter alia, each defendant: (a) transacted business throughout the United States,
16 including in California; (b) researched, developed, sold, shipped, and/or delivered substantial
17 quantities of Imidacloprid topicals throughout the United States, including in California; (c) had
18 substantial contacts with the United States, including in California; (d) engaged in
19 anticompetitive agreements with companies in the United States, including in California, that
20 were directed and had the direct, foreseeable, and intended effect of causing injury to the
21 business or property of companies and consumers residing in, located in, or doing business
22 throughout California and the United States; (e) engaged in the anticompetitive conduct
23 described in below that had the direct, foreseeable, and intended effect of causing injury to the
24 business or property of companies and consumers residing in, located in, or doing business
25 throughout California and the United States; and (f) sold and/or directed their sale of
26 Imidacloprid products to retailers throughout the United States, including in California.

27 12. This Court also has personal jurisdiction over BHC LLC and BAH GmbH
28 because BHC LLC and BAH GmbH intended and knew, or should have known, that their

1 anticompetitive conduct and anticompetitive agreements outlined in this Second Amended
 2 Complaint with nationwide retailers would have the effect of preventing manufacturers of
 3 generic Imidacloprid topicals from competing with BHC LLC and BAH GmbH and of
 4 increasing prices for both retailers and consumers. BHC LLC and BAH GmbH knew, or should
 5 have known, that their anticompetitive agreements and anticompetitive conduct had an impact in
 6 California, and throughout the United States.

7 13. BAH GmbH was not a passive observer in the anticompetitive conduct described
 8 in this Second Amended Complaint, but was an active participant that purposefully directed its
 9 illegal activities at the U.S. Examples of its active participation, more fully described in Section
 10 F below, include:

- 11 (a) Creating and conducting a global generic defense strategy including anti-generic
 12 pricing, second brands, and other measures designed to block generic entry, and
 13 executing this strategy in the U.S.
- 14 (b) Creating and conducting the second brands strategy in the U.S. including the
 15 placement of the Bayer's Defense Care decoy generic at PetSmart.
- 16 (c) Continuously monitoring and modeling potential generic entry in many countries,
 17 including the U.S., so that various tactics could be used to block generic entry.
 18 This was done through a series of working groups that included BAH GmbH
 19 executives, including the Strategic Leadership Team, the Global Brand Team, and
 20 the Key Country Panel, all of which also included U.S. employees. It was also
 21 accomplished through the yearly "Straco," or "strategic consensus" process that
 22 was directed and controlled by BAH GmbH, and included detailed reports on the
 23 timing and effect of generic entry, and strategies for counteracting it.

24 14. Venue is proper in this District because each of the defendants transacts business
 25 in this District and may be found in this District, as defined by 15 U.S.C. § 22. Venue is also
 26 proper in this District under 28 U.S.C. § 1391(b)(1) and (c)(2) because Defendant BHC LLC
 27 maintains a facility in which it transacts business at 455 Mission Bay Blvd. South in San
 28 Francisco, California, and claims to be third largest biotech employer in the Bay Area.

Defendant Bayer Health Care LLC also resides in this District, as it is subject to the Court's personal jurisdiction with respect to this action for the reasons stated in this Second Amended Complaint.

FACTS COMMON TO ALL COUNTS

A. The Relevant Antitrust Market

15. As explained in detail below, in Sections A.1.a through A.2, the relevant antitrust market for analyzing the illegal acts committed by BHC LLC and BAH GmbH is: topical flea and tick products for dogs and cats containing Imidacloprid sold in the U.S. This relevant antitrust market can be clearly defined by reference to several of Bayer's own documents and data, and a straightforward application of the Hypothetical Monopolist Test as used by U.S. antitrust enforcement authorities.

16. The term "market" has many meanings in many different contexts, other than antitrust analysis. In business, politics, journalism, and many other contexts the term "market" is often used in a very broad sense to encompass many loosely related products. Antitrust analysis requires a more precise term and economic definition that is used in answering the core questions of antitrust matters: (1) is the price of a particular product at a competitive level, (2) what products are strong economic substitutes for each other, and (3) has a seller created a monopoly and/or injured competition in a particular product.

17. The U.S. antitrust enforcement authorities, the Department of Justice and the Federal Trade Commission, routinely use the term "relevant antitrust market" to describe the market for a product and its economic substitutes, for the purpose of antitrust analysis. This Second Amended Complaint will use the DOJ/FTC terminology, which is also widely used in the legal and economic literature on antitrust subjects.

1. The Product Market

18. The relevant product market in this case is topical flea and tick products for dogs and cats containing Imidacloprid (including Bayer's name-brand Advantage and Advantix products, and Tevra's generic equivalents of those products). For the reasons explained below, the relevant product market does not include topical products containing other active ingredients

1 such as Fipronil (for example, Frontline and its generic equivalents), or non-topical products like
2 flea collars, oral medications, or shampoos. The limits of the relevant product market are
3 described below in terms of cross-elasticity of demand (Section A.1.a), the Hypothetical
4 Monopolist Test (Section A.1.c-A.1.d), and interchangeability (Section A.1.e-A.1.g).

5 **a. Economic substitutes and cross-elasticity of demand**

6 19. Different products may have similar intended purposes, but whether they are in
7 the same or different relevant antitrust markets depends on: (a) their similarity of characteristics
8 and (b) whether, as an economic matter, buyers actually switch between them based on price.
9 Aspirin and ibuprofen both relieve pain but they are not in the same relevant antitrust market,
10 because buyers do not switch between them based on price. Aspirin is much cheaper than
11 ibuprofen, but many buyers nonetheless purchase ibuprofen (they do not substitute do to price),
12 because ibuprofen is a different product with different characteristics. In fact, many buyers
13 would likely reject aspirin even if the price of aspirin declined or the price of ibuprofen
14 increased, because they want the more desirable characteristics of ibuprofen and do not view
15 aspirin as interchangeable.

16 20. Different products may be said to “compete” in the general sense (because they
17 have the same intended purpose), but the colloquial use of the term “compete” does not mean
18 that they are in the same relevant antitrust market and does not preclude the possibility that one
19 of the “competing” products has been monopolized. It is common for pharmaceuticals and
20 chemicals to be monopolized (often legally by patent protection), even though there are other
21 products that have a similar intended purpose.

22 21. All products have a chain of substitutes, but not every product has “economic
23 substitutes” that are relevant for antitrust analysis. At one end of the chain of substitutes for a
24 particular product are “strong” substitutes. One example is the substitution of beet sugar for cane
25 sugar. In their processed form, they are nearly identical, and buyers treat them as
26 interchangeable. Further down the chain are “weaker” substitutes, such as honey for cane sugar.
27 They are similar, but not identical, in characteristics, and fewer buyer treat them as
28 interchangeable. Ultimately, there may be very weak substitutes for a particular product, such as

1 saccharin for cane sugar, with significantly different characteristics and little or no
2 interchangeability in the eyes of buyers.

3 22. As a matter of economic theory, at competitive prices, buyers will only consider
4 “strong” substitutes for a product they wish to purchase. At competitive prices, buyers would
5 have no reason to consider “weak” substitutes for the product they desire, and would not accept
6 the inferior characteristics of those weak substitutes. For example, buyers have no reason to
7 consider medicines with less-desirable active ingredients if the generic equivalent of their
8 favored medicine (with the same active ingredient) is readily available at a competitive price.

9 23. The economic concept of price elasticity provides a method of separating strong
10 substitutes from weak substitutes for a given product. Price elasticity measures the number of
11 buyers that would switch from Product A to Product B, in response to a change in the price of
12 Product A. Strong substitutes for a given product have a “high elasticity of demand” with
13 respect to that product. Even a small price increase in Product A would cause buyers to switch
14 to the strong substitute Product B. Conversely, weak substitutes for a given product exhibit a
15 “low elasticity of demand” with respect to that product. A small increase in the price of Product
16 A would not result in switching to the weak substitute, Product B, since buyers would want to
17 avoid the inferior characteristics of that substitute.

18 24. As a matter of economic theory, unrestrained competition by strong substitutes
19 keeps prices at a competitive level. That is, if Product A and Product B are strong substitutes,
20 competition from Product A helps maintain competitive prices for Product B, and vice versa. If
21 strong substitutes are unrestrained and competitively available, no opportunity to monopolize the
22 market will arise.

23 25. If strong substitutes are not available (or otherwise constrained), a monopolist is
24 able to increase prices above competitive levels, as buyers are forced into two inferior choices:
25 (1) consider weaker and weaker substitutes, or (2) pay inflated prices. For example, if the
26 manufacture of ibuprofen was monopolized and the average price rose from \$5 per bottle to \$20
27 per bottle, buyers would be faced with the inferior choice of: (1) switch to aspirin, or (2) pay
28 inflated prices. If a monopoly in the manufacture of automobiles raised the average price of a car

1 to \$75,000, buyers would be faced with the inferior choice of: (1) learn to ride motorcycles, or
 2 (2) pay inflated prices.

3 **b. Single-product markets for pharmaceuticals and chemicals**

4 26. Many pharmaceuticals and chemicals are sold in single product markets, because
 5 the price of those products is not constrained by other pharmaceuticals and chemicals that can be
 6 used for the same purpose but are weak substitutes. This is not surprising, since new chemicals
 7 and pharmaceuticals are typically invented, patented, and sold as improvements over the existing
 8 pharmaceuticals and chemicals already available to buyers. Branded products and their generics
 9 typically have high cross elasticity of demand with one another, so markets with generics
 10 typically include the original branded product and its generic equivalents. However, absent
 11 evidence of high cross-elasticity of demand with other products, the branded product and its
 12 generic equivalents are part of a single-product market that does not include other products.
 13 Single product markets for chemicals and pharmaceuticals are common, and have often been
 14 recognized by courts.

15 27. One example of such a single-product market is the market for drugs containing
 16 memantine hydrochloride (“memantine”) for the treatment of Alzheimer’s disease. The Food
 17 and Drug Administration has approved acetylcholinesterase inhibitors (“CIs”) and Namenda, a
 18 drug containing memantine. However, Namenda and generics containing memantine are in a
 19 single product market that does not include CIs.

20 **c. Defining relevant antitrust markets using the Hypothetical**
 21 **Monopolist Test**

22 28. One widely-recognized economic tool for determining the limits of a relevant
 23 antitrust market (and identifying the products in that market) is the Hypothetical Monopolist Test
 24 (“HMT”). This test is commonly used by DOJ and FTC to determine whether certain products
 25 are, or are not, included in a relevant antitrust market.

26 29. As set forth below, a straightforward application of the HMT, using several Bayer
 27 documents and Bayer’s own calculations, shows that Fipronil topicals (including Frontline and
 28 its generics) and non-topical flea and tick treatments are NOT in the same relevant antitrust

1 market as Imidacloprid topicals (including Advantage, Advantix and their generics).

2 30. The HMT is used to determine whether a particular product is part of a relevant
3 antitrust market by considering that product as a possible substitute and answering the following
4 question: Could a hypothetical monopolist raise the price of Product A by a Small, but
5 Significant Non-Transitory Increase in Price (“SSNIP”), without decreasing its profits because of
6 price-induced switching to Product B?

7 31. If a SSNIP would be profitable to a hypothetical monopolist in Product A, then
8 the possible substitute Product B is a weak substitute that should be excluded from the relevant
9 antitrust market. Conversely, if switching to Product B renders a SSNIP unprofitable from the
10 hypothetical monopolist producing Product A, then Product B is a strong substitute and should
11 be included in the relevant antitrust market with Product A.

12 32. The HMT is an iterative process that tests the cross-elasticity (substitutability) of
13 one product after another, and continues until the outer limits of the relevant antitrust market
14 have been defined. If Product B is determined to be in the same relevant antitrust market as
15 Product A (because it renders a SSNIP unprofitable for the hypothetical monopolist in Product
16 A) then the next iteration of the HMT tests the next strongest substitute – Product C. If
17 switching to Product C renders a SSNIP unprofitable from the hypothetical monopolist
18 producing Product A, then Product C is a strong substitute and should be included in the relevant
19 antitrust market with Product A. The process continues until a weak substitute is found that does
20 not render a SSNIP unprofitable for the hypothetical monopolist. At that point, the weak
21 substitute, and all other weaker substitutes, are excluded from the relevant antitrust market.

22 Below is a graphic representation of this analysis:

23 //

24 //

25 //

26 //

27 //

28 //

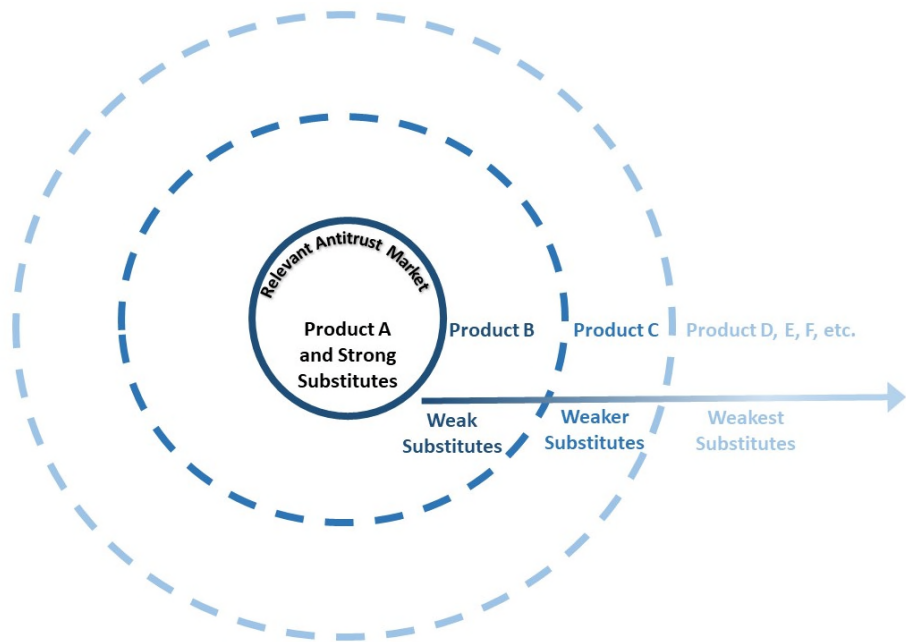


Diagram 1 - Hypothetical Monopolist Test and possible substitutes.

33. To apply the HMT to decide which products are in the same antitrust relevant product market as Bayer’s brand-name Imidacloprid topicals, economists and antitrust enforcement agencies begin by identifying the product that is the closest substitute for Bayer’s brand-name Imidacloprid topicals. The *Horizontal Merger Guidelines* (§ 4.1.3) state that this product should be identified based on evidence of “how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions.” Bayer has identified that product: it is generic Imidacloprid topicals. Bayer knows this because when brand-name and generic Imidacloprid topicals are sold in the same store, more customers switch from Bayer’s brand-name Imidacloprid topicals to generic Imidacloprid topicals than to any other product.

34. The agencies would then apply the HMT to a candidate market that includes only branded and generic Imidacloprid topicals. In that market, a hypothetical monopolist who controlled both the branded and generic products could profitably raise price by a SSNIP. Bayer knows this because it did profitably increase price when it controlled both the branded and the authorized generic Imidacloprid topicals. That price increase was not rendered unprofitable by customers switching to any other product. Therefore, the HMT and the real-world data support the conclusion that no other product is in the antitrust relevant product market.

1 35. The Merger Guidelines (§ 4.4.1) state that the agencies will choose “the smallest
2 relevant market satisfying the hypothetical monopolist test.” Therefore, a market that satisfies
3 the HMT is an antitrust relevant product market even if some weaker substitutes exist outside the
4 market. As the Merger Guidelines (§ 4.4.1) explain:

5 “Groups of products may satisfy the hypothetical monopolist test
6 without including the full range of substitutes from which
7 customers choose. The hypothetical monopolist test may identify a
8 group of products as a relevant market even if customers would
9 substitute significantly to products outside that group in response
10 to a price increase.

11 Example 5: Products A and B are being tested as a candidate
12 market. Each sells for \$100, has an incremental cost of \$60, and
13 sells 1200 units. For every dollar increase in the price of Product
14 A, for any given price of Product B, Product A loses twenty units
15 of sales to products outside the candidate market and ten units of
16 sales to Product B, and likewise for Product B. Under these
conditions, economic analysis shows that a hypothetical profit-
maximizing monopolist controlling Products A and B would raise
both of their prices by ten percent, to \$110. Therefore, Products A
and B satisfy the hypothetical monopolist test using a five percent
SSNIP, and indeed for any SSNIP size up to ten percent. This is
true even though two-thirds of the sales lost by one product when it
raises its price are diverted to products outside the relevant market”

17 36. Bayer has identified other, weaker substitutes for its Imidacloprid topicals, and
18 monitors the extent to which consumers switch from Imidacloprid topicals to those other
19 products in response to changes in price. The products that Bayer tracks most closely are
20 Fipronil topicals such as Frontline, and non-topical Imidacloprid products such as Seresto flea
21 collars and Advantus soft chews. Bayer’s studies show that these weaker substitutes do not
22 constrain Bayer’s ability to raise the price of its Imidacloprid topicals above the competitive
23 level. This confirms that these products are not in the antitrust relevant product market under the
24 HMT.

25 37. Other flea and tick medications exist, such as sprays, shampoos, and drugs
26 available only by prescription. All of those products are weaker substitutes than any of the
27 products discussed above, and are also excluded from the market by the HMT. Below is a
28 graphic representation of the relevant antitrust market for Imidacloprid topicals. Because the

closest substitute, Fipronil topicals, did not constrain Bayer's repeated and significant price increases between 2011 and 2016, they are not included in the relevant antitrust market and neither are more distant substitutes such as oral, collars and shampoos:

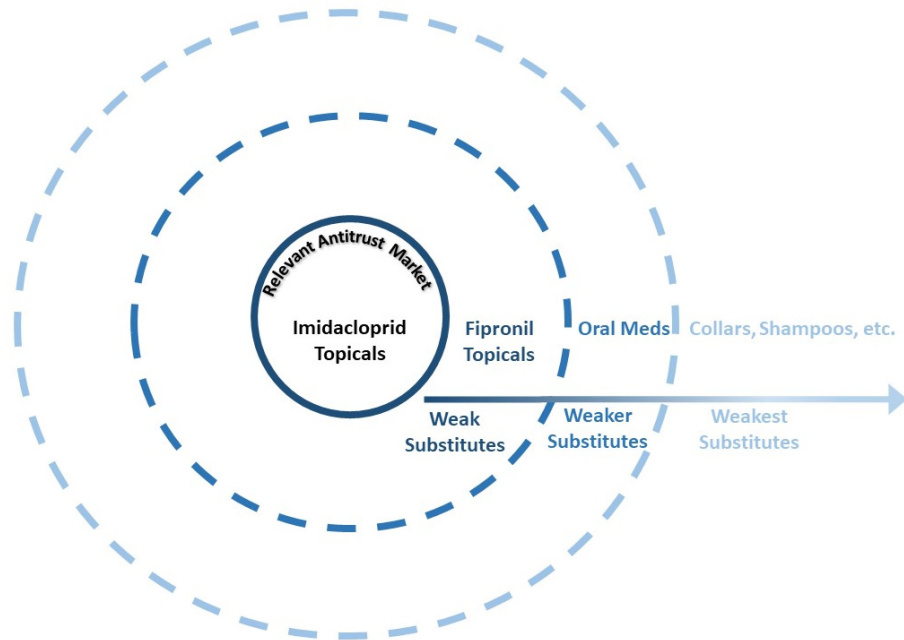


Diagram 2 - Application of the HMT to the Relevant Antitrust Market for Imidacloprid Topicals

38. Thus, to apply the HMT in the present case, one should begin with Bayer's Imidacloprid topicals as Product A, and test whether Product B – Fipronil topicals, renders a SSNIP unprofitable for Bayer. If a SSNIP is profitable for Bayer, then the limits of the relevant antitrust market have been found and Fipronil topicals should be excluded from the market definition.

d. Application of the Hypothetical Monopolist Test to Several of Bayer's documents and datasets

39. Bayer documents discussed in this Section A.1.d demonstrate that Bayer repeatedly raised its prices until they reached monopoly levels, and these price increases were not constrained by Fipronil products or non-topical flea and tick treatments – because they are not in the same relevant antitrust market. In other words, Bayer has repeatedly carried out the SSNIP test in the real world, thereby demonstrating that its Imidacloprid topicals are monopoly

1 products (in a single-product market), being sold at monopoly prices, and making monopoly
2 profits for Bayer.

3 **i. Bayer documents showing significant price increases from**
4 **between 2011 and 2016, including the PetCo dataset**

5 40. The first set of Bayer documents that show its price increases were unrestrained
6 by the presence of Fipronil products and non-topical flea and tick treatments are five years of
7 weekly sales reports for Bayer products at Petco. These reports show price increases between
8 [REDACTED] and [REDACTED] over the five year period between 2011 and 2016, making them both significant and
9 non-transitory within the meaning of SSNIP. Other publicly available price data confirms that
10 the price of Bayer's Imidacloprid topicals increased repeatedly and significantly during these
11 years.

12 41. These price increases were profitable for Bayer and did NOT induce enough
13 switching to either Frontline, generic Fipronil topicals, or non-topical flea and tick treatments to
14 make them unprofitable. This shows that the cross-elasticity of demand between Bayer's
15 Imidacloprid topicals and Fipronil topicals is low, and that they are not in the same relevant
16 antitrust market. The same is true for non-topical flea and tick treatments, which were also weak
17 substitutes, with low cross-elasticity, that did not constrain Bayer's price increases. Indeed, at a
18 March 2017 Strategic Leadership Team meeting in Neuss, Germany (led by BAH GmbH)
19 featured a presentation containing Bayer's own analysis, showing [REDACTED]

20 [REDACTED]
21 [REDACTED] This shows that there was no significant switching to
22 Frontline, or to any other flea and tick treatments, in response to Bayer's price increases. This
23 means that, under the HMT, neither Frontline, nor any of the other flea and tick treatments, are in
24 the same relevant antitrust market.

25 42. Bayer [REDACTED]
26 [REDACTED] To the contrary, by
27 2016, Bayer was charging monopoly prices and reaping monopoly profits. Indeed, certain Bayer
28 documents show that its gross profits on Advantix were over [REDACTED] (meaning that its cost of goods

1 sold was under [REDACTED], and its net profits on Advantix (after all expenses), were [REDACTED] and rising.

2 43. Bayer's price increases between 2011 and 2016 clearly demonstrate that Fipronil
3 topicals and non-topical flea and tick treatments are not strong substitutes for Imidacloprid
4 topicals. During that time period, generic Fipronil topicals from three different manufacturers
5 entered the market: (1) Pet Care Products, Inc. in 2011, (2) Horizon Valley Generics, Inc. in
6 2013, and (3) Hartz Mountain Corporation in 2014. None of these generic Fipronil topicals
7 forced Bayer to cut, or even stabilize, the prices of its Imidacloprid topicals. To the contrary,
8 Bayer was able to repeatedly raise the prices of its Imidacloprid topicals by more than a SSNIP.

9 44. The 2011 to 2016 data collected by Bayer proves that Fipronil topicals and
10 Imidacloprid topicals are not strong substitutes for one another and are not in the same relevant
11 antitrust market. The same is true for non-topical flea and tick treatments, which were also weak
12 substitutes, with low cross-elasticity, that did not constrain Bayer's price increases.

13 **ii. Bayer documents relating to generic price differentials**

14 45. A second set of Bayer documents also prove that the HMT is satisfied with
15 respect to Bayer's Imidacloprid topicals and that they, and their generic equivalents, comprise a
16 relevant antitrust market, with no other strong substitutes. As of 2016, K9 Advantix was [REDACTED]
17 more expensive per monthly dose than the Fipronil-based Frontline. Bayer's own document
18 stated that K-9 Advantix sold for [REDACTED] per dose, whereas Frontline sold for [REDACTED] per dose.

19 46. This extraordinary [REDACTED] price differential shows that Frontline and generic
20 Fipronil topicals were not price constraints on Bayer's Imidacloprid topicals, and is also direct
21 evidence that Bayer was a monopolist, charging monopoly prices and reaping monopoly profits.

22 47. In single-product pharmaceutical markets, it is common for the branded product
23 initially to sell at a higher price than the generics, until competition from generics erodes that
24 price difference. One of Bayer's own documents shows that Bayer's Imidacloprid topicals were
25 selling at a substantial price premium above the first generic Imidacloprid topicals that entered
26 the market. As one Bayer executive complained: [REDACTED]

27 [REDACTED]
28 [REDACTED]

48. Thus, Bayer's price premium over generic Imidacloprid topicals far exceeded Frontline's price premium over generic Fipronil topicals. Frontline lost more than half of the market for Fipronil topicals to generic competition, but Bayer lost virtually none of the market for Imidacloprid topicals to generic competition. The difference in outcomes is the direct result of Bayer's illegal maintenance of its monopoly and illegal exclusive dealing, which the makers of Frontline apparently did not engage in.

49. The enormous price premium that Bayer Imidacloprid topicals were able to maintain over generic Imidacloprid topicals, which was much larger than the price premium that Frontline was able to maintain over generic Fipronil topicals, is further direct evidence that Imidacloprid topicals and Fipronil topicals are not strong substitutes for each other, and that they are in separate relevant antitrust markets. If they were close substitutes and in the same relevant antitrust market, the presence of multiple generic Fipronil topicals would put tremendous downward pressure on the price of Bayer's Imidacloprid topicals. However, as shown by Bayer's own documents discussed below, this did not occur.

50. The enormous premium commanded by Bayer's Imidacloprid topicals over generic Imidacloprid topicals is also strong evidence that Bayer successfully blocked generic competition by the multi-faceted strategy set forth in Sections C, E, and F, below. This differential also shows that Bayer was operating as a monopolist, charging monopoly prices and reaping monopoly profits.

iii. Several Bayer documents contain data to support direct estimates of high cross-elasticity between Imidacloprid topicals but low cross-elasticity between Imidacloprid and Fipronil topicals

51. Bayer's own documents discussed in this Section reflect estimates of the cross-elasticity between various flea and tick products. These documents consistently show a high cross-elasticity between different Imidacloprid topicals (e.g., between Bayer's Advantix and Tevra's Activate II) and a low cross-elasticity between Imidacloprid topicals and Fipronil topicals (e.g., between Bayer's Advantage II and Frontline Plus). The high cross-elasticity (i.e., strong substitution) between Imidacloprid topicals explains why generic Imidacloprid topicals (if

unrestrained) can significantly constrain the price of Bayer's name brand Imidacloprid topicals. The low cross-elasticity (i.e., weak substitution) between Imidacloprid topicals and Fipronil topicals explains why Fipronil topicals such as Frontline have not been effective constraints on the price of Bayer's Imidacloprid topicals. The facts, once again, prove the HMT is satisfied for the relevant antitrust market of only Imidacloprid topicals. Other products, such as Fipronil topicals, are weak substitutes, cannot prevent a SSNIP, and should, thus, be excluded from the relevant antitrust market.

52. Two different documents by Bayer state [REDACTED] and [REDACTED]. Both imply that the cross-elasticity between Imidacloprid topicals is very high and the cross-elasticity between Imidacloprid and Fipronil topicals is nearly zero. Thus, the cross-elasticity between Imidacloprid topicals is many times (possibly hundreds or thousands of times) greater than the cross-elasticity between Imidacloprid and Fipronil topicals.

53. Another real-world example of Bayer's Imidacloprid topicals satisfying the HMT can be found in Bayer's data regarding sales at 458 Pet Supplies Plus stores between 2018 and 2019. These stores sold Frontline Fipronil topicals, generic Fipronil topicals, Bayer Imidacloprid topicals, and a small quantity of generic Imidacloprid topicals, which were subject to Bayer's [REDACTED] contractual restraints, described in Section E.4, below. This data supports the conclusion that there is high cross-elasticity between Bayer's Imidacloprid topicals and generic Imidacloprid topicals, but low cross-elasticity between Bayer's Imidacloprid topicals and Fipronil topicals.

54. Thus, Imidacloprid topicals and Fipronil topicals have low cross elasticities of demand and are not in the same relevant antitrust market.

e. Examination of the Elanco/Bayer acquisition by U.S. FTC

55. An investigation by the U.S. Federal Trade Commission suggests that the FTC does NOT consider Fipronil topicals and Imidacloprid topicals to be interchangeable or in the same relevant antitrust market. Since the filing of the First Amended Complaint in this case, Bayer sold its animal health business to Elanco, in a transaction that was reviewed and

1 challenged as a violation of Section 7 of the Clayton Act by the antitrust regulators at the U.S.
 2 Federal Trade Commission. Further evidence that Imidacloprid topicals and Fipronil topicals
 3 have a low cross- elasticity of demand and are not in the same relevant antitrust market can be
 4 found in FTC's treatment of the Elanco/Bayer acquisition that was completed in 2020.

5 56. In the FTC's investigation of the proposed acquisition, Bayer and Elanco were
 6 required to make detailed disclosures about the animal medications manufactured by each
 7 company, including Bayer's Imidacloprid topicals (Advantage and Advantix) and Elanco's
 8 Fipronil topical (Parastar).

9 57. FTC carefully examined each company's portfolio of animal medications, looking
 10 for any "overlaps" of products which might result in Elanco having market power or a monopoly
 11 in a particular product after the acquisition was completed. To identify and evaluate "overlaps"
 12 which might have anti-competitive effects, FTC typically uses the Hypothetical Monopolist Test,
 13 as described in its *Merger Guidelines*.

14 58. During its review of the Elanco/Bayer acquisition, the FTC identified three
 15 overlapping products in which Elanco might obtain market power or monopoly after the
 16 acquisition was complete: (1) low-dose prescription treatments for canine otitis externa, (2) fast-
 17 acting oral treatments that kill adult fleas on canines, and (3) cattle pour-on insecticides.

18 59. The FTC narrowly defined the market for canine otitis externa treatments,
 19 rejecting "numerous" proposed substitutes, and placing particular emphasis on both the
 20 therapeutic action and the method of administration, as follows:

21 Numerous prescription products treat canine otitis externa, but
 22 only the parties' products—Elanco's Osrnia and Bayer's Claro—
 23 require only one or two doses to treat the condition. ... other
 24 products require numerous applications to the ear canal, up to
 25 twice daily for 14 consecutive days, and are thus not reasonable
 substitutes for the parties' products, which are considerably more
 convenient to use.

26 Federal Trade Commission, Analysis of Agreement Containing Consent Orders to
 27 Aid Public Comment, *In the Matter of Elanco Animal Health, Inc., and Bayer*
 28 *Animal Health, GmbH*, File No. 1910198.

60. The FTC also narrowly defined the market for fast-acting oral flea and tick treatments, again rejecting “numerous” proposed substitutes and again placing particular emphasis on both the therapeutic action and the method of administration, as follows:

While there are numerous products that kill and prevent fleas on dogs, most are slower acting or preventative, targeting flea larvae. In contrast, Elanco's Capstar and Bayer's Advantus start killing adult fleas quickly (within 30 minutes for Capstar, and within 60 minutes for Advantus), and eliminate all adult fleas within four hours. Medicated shampoos and sprays that can be used to kill adult fleas are much less convenient to administer and are slower-acting.

Id.

61. In each case where an overlap was identified, FTC required Bayer and/or Elanco to divest one or more products, to settle the FTC's antitrust challenge to the transaction.

62. Significantly, FTC did not identify an overlap between Bayer's Imidacloprid topicals and Elanco's Fipronil topicals, and did not order divestiture of either of these products. This is not surprising, since Imidacloprid topicals have different active ingredients and significantly different therapeutic actions. This is also further evidence that Imidacloprid topicals and Fipronil topicals are not in the same relevant antitrust market.

f. Imidacloprid topicals are distinct from and non-interchangeable with Fipronil topicals.

63. The active ingredients in flea and tick treatments are insecticides that kill and/or repel fleas and ticks. Some of these insecticides are common agricultural insecticides that are manufactured in enormous quantities and used worldwide. Two common insecticides used for flea and tick protection are Fipronil (which is the active ingredient in the topical treatment Frontline, and generics that compete with Frontline), and Imidacloprid (which is the active ingredient in Bayer's Advantage and Advantix, and generics that compete with those products).

64. Because common agricultural insecticides like Fipronil and Imidacloprid are widely available, inexpensive commodities, they usually constitute a small percentage of the cost of flea and tick treatments. Instead, the major costs for most flea and tick treatments are the delivery systems for these active ingredients (such as a collar or a “squeeze-on” topical solution),

1 together with the very substantial costs of obtaining regulatory approval by the U.S.
2 Environmental Protection Agency for the use of the particular formulation of active ingredients
3 in each flea and tick treatment, as well as the costs of marketing, selling and delivering the
4 products.

5 65. Neither wholesale nor retail buyers of Imidacloprid topicals and Fipronil topicals
6 consider them to be interchangeable because they have distinct characteristics. In addition,
7 wholesale buyers overwhelmingly purchase Imidacloprid topicals for re-sale, not to use on their
8 own pets.

9 66. Imidacloprid topicals and Fipronil topicals are not therapeutic equivalents,
10 because Imidacloprid topicals have therapeutic actions that Fipronil topicals lack. Specifically,
11 Imidacloprid topicals repel fleas, ticks and mosquitoes, thereby preventing those insects from
12 biting the pet. Fipronil topicals cannot repel fleas, ticks or mosquitoes, and those insects must
13 bite the pet, in order to receive a lethal dose of the insecticide.

14 67. Bayer did not consider Fipronil topicals to be economic substitutes for Bayer's
15 Imidacloprid topicals. Instead, Bayer deliberately priced its Imidacloprid-based Advantix
16 product higher than the Fipronil-based Frontline Plus product, because of [REDACTED]
17 [REDACTED]

18 68. Bayer's contracts with distributors and retailers also demonstrate that Bayer did
19 not consider Fipronil topicals to be economic substitutes for Bayer's Imidacloprid topicals.
20 Those contracts single out Imidacloprid generics and give the retailers a financial incentive to
21 exclude them. However, those same contracts do not offer any similar financial incentive to
22 exclude either name-brand or generic Fipronil topicals.

23 69. As explained below in Section E, several of Bayer's documents show that it was
24 extremely concerned about the entry of generic Imidacloprid topicals into the market, that it
25 created a strategy to [REDACTED] of Imidacloprid topicals, and that it reached out to its
26 distributors and retailers to [REDACTED] of Imidacloprid topicals.

27 However, Bayer did not pursue a similar strategy regarding the entry of new Fipronil topicals,
28 including the Fipronil topicals manufactured and sold by Tevra. This further demonstrates that

1 Bayer did not consider Fipronil topicals to be economic substitutes for its Imidacloprid topicals.

2 70. Flea and tick medications containing Fipronil are not in the relevant market
3 because several of Bayer's own documents and data show that they have a low cross-elasticity of
4 demand with Bayer's Imidacloprid topicals, and that they are weak substitutes that did not
5 constrain price increases of Bayer products to monopoly levels.

6 71. In addition to having distinct formulations, distinct purposes, and distinct pricing,
7 the industry recognizes the two types of products as separate from one another. Nielsen, a global
8 measurement and data analytics company in the industry for pet products, tracks data for Fipronil
9 and Imidacloprid separately.

10 72. From a merchant's perspective, Imidacloprid topicals and Fipronil topicals are
11 complements, not substitutes. Merchants who purchase for resale do not substitute one for the
12 other in response to price changes, because consumers expect retailers to carry both products.
13 Consumers generally buy only one flea and tick treatment at a time, but retailers buy a full line
14 of flea and tick treatments. Imidacloprid and Fipronil are not interchangeable to merchants who
15 purchase for resale. To remain competitive and to offer the products that customers expect to
16 find, retailers must carry both formulations. Diagram 3, below, illustrates the different paths
17 through the distribution chain by which Imidacloprid topicals might reach pet owners. As
18 shown, distributors and retailers are not purchasing Imidacloprid topicals to apply to their pets,
19 but rather for re-sale. Therefore, they view many different flea and tick products as
20 complements, rather than substitutes, so that they can offer choices to their customers.

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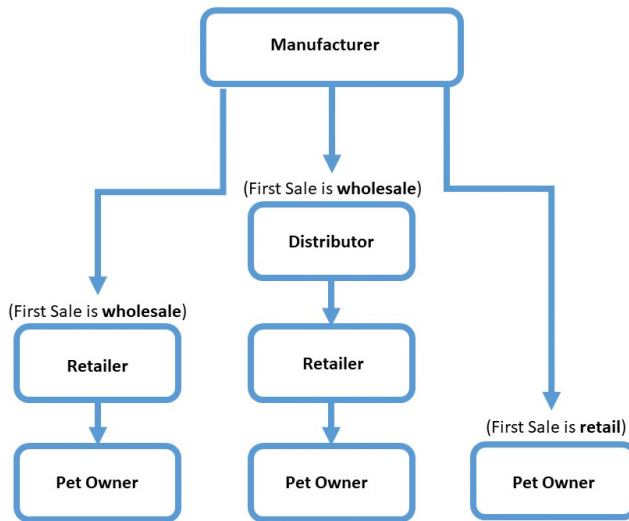


Diagram 3 – Distribution chains for Imidacloprid topicals

g. Topical flea and tick medications and delivery systems

73. Distinct, non-interchangeable, products deliver flea and tick treatment to pets in different ways, including flea collars, topicals, oral medications, sprays, wipes, and shampoos. As set forth in Section A.1.d in this Second Amended Complaint, Bayer’s own data and documents show that a small but significant non-transitory price increase in the price of Imidacloprid topicals did not lead consumers to switch from Imidacloprid topicals to non-topical flea and tick products. These non-topical flea and tick treatments are therefore weak substitutes that are not part of the relevant antitrust market.

74. In 2018, the fastest growing type of flea and tick product was the flea and tick collar, led by Bayer’s Seresto flea collar. The Seresto flea collar is a comparatively expensive product, typically offered by retailers at \$40 to \$69 per collar. Bayer claims that the Seresto flea collar has a major advantage over other flea and tick treatment products, because it provides eight months of protection from a single application.

75. “Topical” liquid treatments that are applied directly to a pet’s skin or fur are distinct from flea collars. In 2018, topicals accounted for the largest dollar amount of flea and tick treatment sales.

1 76. Flea and tick treatments may also be given to pets orally. However, oral
2 Imidacloprid products like Bayer's Advantus kill only adult fleas, and do not prevent re-
3 infestation unless given every day. Additionally, many consumers think of oral treatments as
4 inconvenient and difficult to administer, because many pets will not consume the oral treatments,
5 or will expel them. In some instances, consumers cannot administer such medications to their
6 pets without using food or pill pouches to conceal the taste and smell of the medication. Even
7 then, pets may reject them. The inconvenience of trying to administer oral products makes them
8 a weak substitute for Imidacloprid topicals.

9 77. Other products that contain flea and tick treatments include sprays, wipes, and
10 shampoos. Those products account for a small percentage of total flea and tick treatment sales.
11 Sprays, wipes, and shampoos are not part of the relevant market because they are generally not
12 used for the prevention of fleas and ticks. Sprays, wipes, and shampoos are used for alleviating
13 symptoms in animals that are already infested with fleas and/or ticks. These products can kill
14 fleas and ticks on contact, but are generally aimed at relieving infested animals from itching and
15 pain caused by fleas and ticks and washing away dead pests.

16 78. The relevant product market in this case does not include flea collars. Flea collars
17 and topical flea and tick treatments are not interchangeable for most consumers. Some
18 consumers prefer the convenience and ease of using a single flea collar for up to 8 months, but
19 will not accept the frequency and difficulty of applying a topical treatment to their pet. Other
20 consumers prefer the lower per-dose price of topicals and the control they have over when to
21 apply them, but dislike the higher initial cost, smell, and appearance of flea collars. In addition,
22 some consumers do not purchase flea collars due to safety concerns.

23 79. Similarly, from the retailer's perspective, topical products are not substitutes for
24 other delivery systems for flea and tick medications like oral treatments, flea collars, shampoos,
25 and baths. Rather, these retailers must carry and sell each of these types of products to remain
26 competitive. For retailers, these different categories of products are complements, not
27 substitutes.
28

1 **2. The Geographic Market**

2 80. The geographic market for analyzing the antitrust violations committed by Bayer
3 is the United States. Manufacturers of Imidacloprid topicals sell those products to retailers with
4 locations throughout the United States, and to distributors throughout the United States who sell
5 the products to retailers, and those retailers subsequently sell the products to consumers in all
6 fifty states. Because these products are based on pesticides regulated by the U.S. Environmental
7 Protection Agency, they can only be imported or sold by companies that register them for
8 particular uses. This regulatory constraint defines the limited geographic market as the United
9 States.

10 **B. Fipronil generics lowered prices of Fipronil flea and tick medications.**

11 81. In 1997, Merial (later purchased by Boehringer-Ingelheim) introduced its
12 Frontline topical formulation of Fipronil to the U.S. market. Frontline has remained the single
13 best-selling brand of Fipronil topical since that time.

14 82. Beginning in 2011, generic Fipronil topicals, which compete directly with
15 Frontline, entered the U.S. marketplace. By 2018, generic Fipronil topicals accounted for
16 approximately 52% of Fipronil topical sales, with Frontline still accounting for about 48%.

17 83. The results of generic Fipronil topicals entering the separate market for Fipronil
18 topicals have been more competition against Frontline, lower prices, and more choices for
19 retailers and consumers in that market.

20 84. Unlike Fipronil, despite the attempted entry of at least two generic Imidacloprid
21 topical manufacturers in the past few years, at least 85% of the relevant market for Imidacloprid
22 topicals is still controlled by Bayer. Bayer has a monopoly in the relevant market and effectively
23 controls 100% of that market, because Bayer receives patent license royalties for most or all of
24 the remaining 15%. Because of Bayer's anti-competitive conduct, the relevant market has not
25 benefitted from the entry of generics, as the Fipronil market did.

1 **C. Bayer has substantially foreclosed Imidacloprid topical generics from the relevant**
 2 **market.**

3 **1. Imidacloprid products, including Advantix**

4 85. Monopolies are not necessarily illegal, can be acquired legally, and are actually
 5 encouraged by U.S. patent laws that give an inventor the temporary right to exclude others from
 6 making the same product.

7 86. Bayer appears to have initially acquired its monopoly in Imidacloprid topicals
 8 legally, through the process of scientific research and invention. Bayer sought and obtained a
 9 10-year period of “exclusivity” by registering its Imidacloprid formulation with the U.S.
 10 Environmental Protection Agency. Bayer also sought and obtained legal protection for its
 11 monopoly by obtaining U.S. patents on its invention.

12 87. In 2002, Bayer introduced its Advantage line of Imidacloprid topicals, which now
 13 includes Advantage II and K9 Advantix-II. Bayer protected its inventions by obtaining several
 14 U.S. patents, one of which expired in 2015.

15 88. In 2016, the generic manufacturer CAP IM Supply, Inc. was granted conditional
 16 registration by EPA for its generic Imidacloprid topical, and became the first manufacturer of
 17 generic Imidacloprid topicals to attempt to enter the market for Imidacloprid topicals.

18 89. On May 22, 2017, three Bayer entities, including Defendant BHC LLC and
 19 Defendant BAH GmbH filed a patent infringement lawsuit against CAP IM Supply, Inc. in U.S.
 20 District Court for the District of Delaware. This lawsuit was shortly settled and CAP IM began
 21 paying Bayer royalties for the use of its patented formula.

22 90. Imidacloprid topicals produced by CAP IM have been sold in the U.S. by several
 23 companies including TruRx and PetIQ, under various brand names including Advecta, PetLock
 24 and ParaDefense. These sales do not represent unrestrained generic competition against Bayer,
 25 but rather are licensed products, also known as “authorized generics,” from which Bayer profits
 26 through its receipt of royalties. Bayer successfully had CAP-IM’s product “PetLock” removed
 27 from store shelves at PetCo, and appears to have relegated CAP-IM products to the less-lucrative
 28 “Food, Mass, and Drug” channel of grocery stores, discount stores, and drug stores.

91. As set forth below, Bayer has illegally maintained its monopoly and prevented the entry of true generic Imidacloprid topicals by: (1) using a “2nd Brand Strategy” by packaging a Bayer product to appear that it was generic, (2) entering into verbal “no generics” agreements with retailers, (3) making direct payments to a retailer to have a generic competitor removed from its shelves, and (4) changing its contracts with retailers to punish those who carried generic competitors to Bayer, and reward those who did not.

92. The results of Bayer’s illegal, anticompetitive, and exclusionary actions have been less competition, higher prices, and fewer choices for retailers and consumers.

2. Registration of insecticides with EPA and “exclusive use”

93. The insecticides used as active ingredients in flea and tick treatments are regulated by the U.S. Environmental Protection Agency, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136a, *et seq.* This statute requires that manufacturers of insecticides register each formulation before offering it for sale in the U.S.

94. To obtain EPA registration under FIFRA for the use of an insecticide for a particular purpose, a company must submit detailed scientific data demonstrating the safety and effectiveness of that use of the insecticide formulation.

95. If the EPA agrees to register the use of an insecticide for a particular purpose, the registering company has “exclusive use” of the data used to register that insecticide for that purpose, for a period of 10 years after registration, pursuant to FIFRA, 7 U.S.C. § 136a, *et seq.*

96. The 10-year “exclusive use” period created by FIFRA registration effectively gives the registering company a monopoly over the use of the insecticide for the particular purpose.

97. The 10-year exclusive use period under FIFRA has expired for both Fipronil and Imidacloprid topicals, allowing generic manufacturers such as Tevra to attempt to enter the market. Although Bayer’s Imidacloprid topical is also patented, Tevra’s formulation is different and Tevra’s Imidacloprid topical does not infringe Bayer’s patents.

98. In 2015, Tevra used the FIFRA statutory procedure to pay Bayer “data compensation” for the use of Bayer’s supporting data in its EPA registration of Imidacloprid for

1 use in topical flea and tick treatments. This allowed Tevra to manufacture and sell Imidacloprid
 2 topicals in the U.S., but it also alerted Bayer to the fact that generic competition was coming.

3 **D. Tevra's attempts to enter the market for Imidacloprid topicals**

4 99. In 2016, Tevra created detailed sales forecasts for both its generic Fipronil
 5 topicals and its generic Imidacloprid topicals. Tevra recognized that it could sell several times
 6 more generic Imidacloprid topicals than generic Fipronil topicals, due to several factors.

- 7 a. First, by 2016, the market for Imidacloprid topicals was expanding, while the
 8 market for Fipronil topicals was shrinking.
- 9 b. Second, the Fipronil topical market was already crowded with generic
 10 competition. Velcera's "Pet Armor" generic Fipronil topical entered the market
 11 to compete with the name brand Frontline in 2011. Since that time at least four
 12 other manufacturers had entered the market for Fipronil topicals. This crowded
 13 market for Fipronil topicals made it difficult for another entrant, like Tevra, to
 14 obtain sales and market share.
- 15 c. Third, there were no generic Imidacloprid topicals being sold. Tevra could
 16 therefore be the first generic entrant. Tevra's formulation was patented and did
 17 not infringe Bayer's patents, so Tevra had protection from other generics.
- 18 d. Fourth, generic Imidacloprid topicals could be sold at higher prices than generic
 19 Fipronil topicals, because Bayer had acquired a monopoly with its Imidacloprid
 20 topicals due to its patents and its prior "exclusive use" from its EPA registration.
 21 The price of the first generic is lower than the price of the monopoly branded
 22 product, but a high-priced branded product generally permits a higher price for
 23 the first generic.
- 24 e. Fifth, consumers are willing to pay more for Imidacloprid topicals than for
 25 Fipronil topicals.

26 100. Tevra immediately went to work licensing a generic Fipronil topical to compete
 27 against Boehringer's name brand Frontline, as well as registering a generic Imidacloprid topical
 28 to compete against Bayer's name brand Advantix. Tevra applied for EPA registration of its

1 generic Imidacloprid topical. The EPA granted the registration of Tevra's generic Imidacloprid
2 topical in 2017.

3 101. Tevra's Imidacloprid topicals are more effective than Bayer's Imidacloprid
4 topicals. Both topicals contain the same active ingredient. However, Tevra's method of
5 delivering that active ingredient to the skin of the pet is superior to Bayer's.

6 102. Controlled experiments have demonstrated that Tevra's Imidacloprid topicals kill
7 over 99% of fleas, just as Bayer's do, but Tevra's Imidacloprid topicals also kill ticks more
8 effectively than Bayer's. In addition, Tevra's Imidacloprid topicals are less toxic than those
9 produced by Bayer, due to their superior delivery method.

10 103. Even before EPA registration was complete, Tevra hired a sales team of
11 professionals with experience in the industry, and aggressively pursued sales to retailers.
12 Beginning in 2016, Tevra's salespersons met with representatives of numerous retailers,
13 including those identified below.

14 **1. Tevra's successful entry into the separate Fipronil topical market**

15 104. In 2017, Tevra made its first sales of its generic Fipronil topical. Because Tevra's
16 product was a less expensive, equally effective alternative to Frontline, Tevra was able to
17 demonstrate to retailers that carrying Tevra's generic Fipronil topical would increase sales and
18 profits for the retailers.

19 105. Attracted by the price and profitability advantages of Tevra's generic Fipronil
20 topical, retailers began buying it in large quantities. Tevra made a profit of over \$2.4 Million
21 from online and pet specialty sales of its generic Fipronil topical in 2018.

22 **2. Tevra was foreclosed from entering the Imidacloprid topical market**

23 106. Tevra's attempts to sell its less expensive, more effective, generic Imidacloprid
24 topical have been substantially foreclosed by Bayer's illegal monopolization and exclusive
25 dealing.

26 107. Tevra attempted to sell its generic Imidacloprid topical to some of the same
27 retailers that were already carrying Tevra's generic Fipronil topical. However, as set forth in
28 Section E.2, below, numerous retailers refused to carry Tevra's generic Imidacloprid topical, and

1 five of those retailers, or their distributors, explicitly cited some type of agreement with Bayer as
 2 the reason for their refusal. These retailers have refused to carry generic Imidacloprid topicals
 3 from Tevra, even though several of them sell generic Fipronil topicals.

4 108. In a competitive market, Tevra would be able to sell its products to retailers and
 5 distributors. Its generic Imidacloprid topicals are more effective than Bayer's brand-name
 6 Imidacloprid topicals. Tevra's generic Imidacloprid topicals are also significantly less expensive
 7 than Bayer's brand-name Imidacloprid topicals. Indeed, Tevra has offered to sell retailers
 8 generic Imidacloprid topicals for approximately 50% or less of Bayer's discounted wholesale
 9 price (as stated in its written contracts) for K9 Advantix II Imidacloprid topicals.

10 109. Despite the lower prices of Tevra's Imidacloprid topicals, multiple major retailers
 11 and distributors have refused to purchase Tevra's Imidacloprid topicals, and Tevra has been
 12 unable to sell any significant quantities of its Imiadocloprid topicals.

13 110. If a retailer purchased Tevra's generic Imidacloprid topicals, the retailer could
 14 charge consumers prices that are significantly lower than the retail prices of Bayer's
 15 Imidacloprid topicals.

16 111. From 2017 to 2020, Tevra sold almost none of its generic Imidacloprid topical.

17 **E. Bayer's Monopolization and Exclusive Dealing Foreclosed Entry into the Market**
 18 **for Imidacloprid Topicals**

19 112. In order to maintain its monopoly in Imidacloprid topicals, Bayer willfully and
 20 deliberately carried out four strategies to block generic entry and competition. First, as described
 21 in Section E.1 below, BAH GmbH initiated and led a "second brands" strategy in which a Bayer
 22 product that resembled a generic was used to keep a generic competition off store shelves.
 23 Second, as described in Section E.2 below, Bayer made a verbal "no generics" deal with
 24 retailers, and shared some of its monopoly profits in exchange for the retailer's agreement not to
 25 offer generic Imidacloprid topicals. Third, as described in Section E.3 below, Bayer directly
 26 paid at least one retailer to remove generic Imidacloprid topicals from its shelves. Fourth, as
 27 described in Section E.4 below, Bayer changed the terms of its contracts with retailers to create
 28 strong incentives not to carry generic Imidacloprid topicals, and to punish retailers who did.

113. All of the acts described in the immediately preceding paragraph were done willfully, and purposely directed at the U.S. market, with a specific intent to monopolize the relevant antitrust market for Imidacloprid topicals and to substantially foreclose competition in that market.

1. Bayer's "second brand strategy" to block generic entry

114. BAH GmbH conceived and led a "second brand strategy" in the U.S., because that strategy had been successful in excluding generics in other countries. Certain Bayer documents show that BAH GmbH purposefully directed this strategy at the U.S. market for Imidacloprid topicals, citing the success of this strategy in the U.K., Italy, and elsewhere. These documents are listed and quoted below, in Section F, dealing with BAH GmbH's participation in the illegal monopolization and exclusive dealing in the U.S.

115. As part of the 2015 Straco process mandated by BAH GmbH, a slide deck dated April 9, 2015 described Bayer's U.S. strategy to [REDACTED]

116. In furtherance of the "second brand" strategy, another German Bayer entity manufactured the Defense Care line of products including what appear to be an "authorized generic" brand of Imidacloprid topical. This "second brand" was actually intended to be a shelf-space filler, and prevent retailers from stocking true generic competition to Bayer's name-brand products. It allowed Bayer to continue to make profits on every sales, but to avoid "compare-to" placement and advertising by actual generic competitors – which is critical for a generic product that is being sold against a name-brand. Not surprisingly, Defense Care did not sell well at PetSmart, since there was no "compare-to" packaging, placement, signage, or advertising.

117. The purpose of the second brand strategy led by BAH GmbH was to prevent PetSmart from offering any Imidacloprid topicals that were not manufactured by Bayer. This strategy was used at PetSmart in 2015 and 2016, and continued until Bayer began implementing another strategy to block generic entry, which required the participation of PetSmart and the other major pet specialty and internet retailers.

118. The Defense Care brand was approved by BAH GmbH for use as a “second brand” in the U.S., and used at PetSmart in 2015 and 2016. Documents from BAH GmbH refer to Defense Care as a [REDACTED] and a [REDACTED] at PetSmart. These documents include an email by Sebastian Holl to David Zapatero, Global Brand Manager at BAH GmbH, dated October 24, 2014 that noted [REDACTED]

119. On November 20, 2015, Kristina Pollok, Strategic Controlling at BAH GmbH, exchanged an email with Ian Spinks, Karl Wehner, and Andy May. The email, part of which was written by Ian Spinks, then the President and General Manager of Animal Health North America at BHC LLC, said in part that the [REDACTED]

2. Bayer’s “no generics” conspiracy with retailers

120. In addition to the “second brands” anti-generics strategy described above, Bayer went directly to major retailers, including PetSmart and PetCo, with an offer to increase the retailer’s profits if, and only if, the retailers would refuse to carry generic Imidacloprid topicals. Bayer was able to do this because it had been charging monopoly prices and making monopoly profits from the sale of its Imidacloprid topicals after years of substantial price increases since at least 2011. Bayer effectively offered to share its monopoly rents with the retailers in exchange for their help maintaining its monopoly. The deal was profitable for both Bayer and the retailers – to the detriment of consumers and Bayer’s generic competitors like Tevra.

121. Bayer’s documents listed below show that Bayer appealed directly to distributors and retailers to help it [REDACTED] These include:

On September 14, 2015, Jeriel Chua, then a U.S. brand manager for BHC LLC and later a global brand manager for BAH GmbH, sent an email to Craig Reinert, the Key Account Manager for PetCo at BHC LLC attaching the [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 On September 22, 2015, Bobbi Messner, then the Key Account Manager-Pet Specialty
5 for BHC LLC, sent an email to other BHC LLC employees, [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 On February 15-17, 2016, BHC LLC held a “Distributor Retail Summit” in Ft Worth,
9 Texas, which was attended by most of the major distributors and retailers in the U.S.

10 One of the stated goals of the summit, as shown by one of Bayer’s slide presentations,
11 [REDACTED]
12 [REDACTED] [Emphasis
13 added.]

14 122. The “no generics” agreement with distributors like Veterinary Service, Inc. and
15 Animal Supply Company, and retailers like PetSmart and PetCo was premised on the idea that
16 generic Imidacloprid topicals, [REDACTED] sales of
17 Bayer’s name brand Imidacloprid topicals. Several Bayer documents complain about this
18 [REDACTED] and the fact that consumers will [REDACTED] for the less expensive generic
19 Imidacloprid topicals.

20 123. To stop the [REDACTED] and to prevent consumers from [REDACTED]
21 Bayer approached distributors and retailers, including PetSmart and PetCo, with a remarkably
22 bold (and illegal), proposition: Keep the generics out, keep the name brand prices high, and
23 Bayer will compensate the retailers (with some of its monopoly profits).

24 124. Bayer made written presentations to both PetCo and PetSmart in 2016 and was
25 very explicit about the increased profits both Bayer and the retailers could make by keeping
26 generic Imidacloprid topicals off the store shelves.

27 125. When Bayer made its presentation to PetCo in August 2016, PetCo was carrying a
28 generic Imidacloprid topical called “PetLock.” Even though Bayer was collecting royalties on

every unit of PetLock sold (as a result of its settlement agreement with CAP-IM, the maker of PetLock), Bayer still wanted to convince PetCo to remove PetLock from its shelves, so that Bayer could make even more money.

126. Bayer's presentation to PetCo began with the admission that [REDACTED]

[REDACTED]

127. Some of the key provisions of Bayer's August 2016 presentation to PetCo include the following: [REDACTED]

[REDACTED]

[REDACTED] AUR stands for Average Unit Retail, which means "price."

128. Bayer also showed PetCo that it could benefit from Bayer's [REDACTED] and told PetCo that it would be a [REDACTED] to get the generic Imidacloprid topicals off its shelves so that it could make more money by cooperating with Bayer to maintain Bayer's monopoly.

129. A month later, in September 2016, Bayer made virtually the same presentation to PetSmart. Key points in this presentation included the following: [REDACTED]

[REDACTED] Again, AUR stands for Average Unit Retail, which means "price."

130. Bayer's presentation to PetSmart offered several different sources of money to PetSmart, if it would agree to remove the generic Imidacloprid topicals. These included the

[REDACTED]

1 131. Bayer’s pitches to both PetCo and PetSmart to “play ball” by removing generic
2 competition and offering their customers only the higher priced Bayer name brands, were
3 successful. The explicit deal between Bayer, PetCo and PetSmart is price-fixing in its purest
4 form – it is an agreement to exclude competitors, keep retail prices artificially high and to divide
5 the ill-gotten profits. The only losers in the deal were consumers who were forced to pay higher
6 prices, generic manufacturers such as Tevra that were foreclosed from competition, and the rule
7 of law as enshrined in the Sherman Act and the Clayton Act.

8 132. More than one distributor has explicitly told Tevra that it believes it has a “no
9 generics” agreement with Bayer, even though the written contracts do not expressly include the
10 verbatim phrase “no generics.” For example, in March 2017, a representative of Veterinary
11 Services, Inc., a major nationwide distributor, told a salesperson from Tevra about a “Bayer
12 agreement,” and said that “they were going to let us know if the agreement prohibits them from
13 adding another Imidacloprid product.” Veterinary Services, Inc. ultimately refused to purchase
14 Imidacloprid topicals from Tevra. Animal Supply Company, another nationwide distributor, was
15 even more explicit when its agent told a Tevra salesperson in March 2021 that they could not
16 purchase “any products with Imidacloprid” from Tevra due to an agreement with Bayer, and
17 added “If I lose Bayer, I’ll get fired.” Notably, by the time this statement was made, Bayer had
18 sold its U.S. animal health assets to Elanco, but the ASC agent still referred to it as “Bayer.”

19 133. Tevra’s foreclosure from major nationwide distributors is, to some extent, even
20 more damaging than its foreclosure from pet specialty and internet retailers. These distributors
21 re-sell products into multiple sales channels, including independent pet stores, veterinarians, and
22 a variety food, drug, and discount stores. Foreclosure from distributors like Veterinary Services,
23 Inc. and Animal Supply Company deprives Tevra of a one very effective point of entry into
24 multiple sales channels.

25 134. More than one retailer has explicitly told Tevra that it believes it has a “no
26 generics” agreement with Bayer, even though the written contracts do not expressly include the
27 verbatim phrase “no generics.” For example, Chewy.com told Tevra that “they had an
28 agreement with Bayer that prevented them from offering a generic to Bayer’s K9 Advantix,” or

1 words to that effect. Drs. Foster & Smith (later PetCo.com) told Tevra about “the recent Bayer
2 ‘no generic’” or words to that effect. PetMed Express (formerly 1-800-Pet-Meds) told Tevra
3 about its “program with Bayer and not allowing any generic equivalence,” or words to that
4 effect.

5 135. Retailers Chewy.com, Drs. Foster & Smith (now Petco.com), and PetMed
6 Express are internet retailers, while PetCo, PetSense and PetSmart are pet specialty “brick and
7 mortar” retailers. Tevra offered each of these retailers generic Imidacloprid topicals at prices
8 that are about 50% lower than the discounted prices of Imidacloprid topicals offered by Bayer
9 under its Purchase Agreements, but each retailer refused to carry Tevra’s product, despite
10 Tevra’s generic Imidacloprid topicals being more effective than Bayer’s Advantix II product.

11 136. Tevra began discussions to sell generic Imidacloprid topicals to Chewy.com in the
12 fall of 2016. In 2017, a representative of Chewy.com told a Tevra salesperson that Chewy.com
13 “had a contract with Bayer and could not offer a generic to K9 Advantix II,” or words to that
14 effect. Chewy.com also told another Tevra salesperson “that they had an agreement with Bayer
15 that prevented them from offering a generic to Bayer’s K9 Advantix,” or words to that effect.

16 137. In July 2018, Tevra salespersons again met with representatives from Chewy.com
17 and discussed the possibility of Chewy.com carrying Tevra’s generic Imidacloprid topical in
18 competition with Bayer’s K9 Advantix II. A representative of Chewy.com told a Tevra
19 salesperson that “they understand the opportunity but need to be able to make up potential lost
20 marketing dollars from Bayer,” or words to that effect.

21 138. In October 2018, a Tevra salesperson spoke with a representative of Chewy.com,
22 who told the Tevra salesperson that Chewy.com “is trying to work with Bayer on the contract.
23 There was some old language in the old agreement that either prevented [Chewy.com] from
24 offering a generic or featuring ‘Compares to’ or contains the same active ingredient,” or words to
25 that effect.

26 139. In 2019, Chewy.com told a representative from Tevra that if Chewy.com
27 purchased Tevra’s product, “they would lose \$3 million dollars in net margin taking into account
28 the reduced Bayer rebate vs. what they thought they would make in margin selling [Tevra’s]

1 product,” or words to that effect.

2 140. At the wholesale price Tevra offered Chewy.com, and if Chewy.com had
3 accepted Tevra’s proposal, Tevra projected that it would have sold Chewy.com approximately \$2
4 million in Imidacloprid topicals during the time period covered by Chewy.com’s \$3 million
5 estimate described in the above paragraph.

6 141. Tevra could not profitably offer a discount to match Bayer’s discount of at least
7 \$3 million because it would have had to sell to Chewy.com its product at an approximate \$1
8 million loss. In addition, Tevra could not offer a comparable bundle of products because only
9 Bayer can offer Seresto, which is protected by U.S. patents.

10 142. Chewy.com ultimately refused to purchase Tevra’s generic Imidacloprid topical.

11 143. In 2018, Tevra salespersons were attempting to convince Drs. Foster & Smith
12 (later PetCo.com) to carry Tevra’s generic Imidacloprid topical. A representative of Drs. Foster
13 & Smith (later PetCo.com) told one of Tevra’s salespersons that Drs. Foster & Smith (later
14 PetCo.com) would not carry Tevra’s generic Imidacloprid topical because “it was a conflict of
15 interest given the recent Bayer ‘no generic’ as to pulling advertising funding and lucrative
16 rebates,” or words to that effect.

17 144. Drs. Foster & Smith (later PetCo.com) ultimately refused to purchase and stock
18 Tevra’s generic Imidacloprid topical.

19 145. In 2018, salespersons for Tevra made a presentation to PetMed Express (formerly
20 1-800-Pet-Meds). During that presentation, a representative of PetMed Express stated that “they
21 had an agreement with Bayer.” PetMed Express did not carry any generics that compete directly
22 against Bayer flea and tick treatments as of December 2018.

23 146. In 2019, a sales person for Tevra had a discussion with a representative of PetMed
24 Express in which the representative described PetMed Express’s “program with Bayer and not
25 allowing any generic equivalents,” or words to that effect.

26 147. PetMed Express ultimately refused to purchase and stock Tevra’s generic
27 Imidacloprid topical.

28

1 148. In the summer of 2018, Tevra salespersons made presentations to PetCo showing
2 the sales and profitability advantage of Tevra's generic Imidacloprid topical. A representative of
3 PetCo later told a Tevra salesperson that PetCo had "no interest in Own Brands or generic
4 compromise as the Bayer rebates are HUGE," or words to that effect.

5 149. PetCo ultimately refused to purchase and stock Tevra's generic Imidacloprid
6 topical.

7 150. In February 2017, a salesperson for Tevra informed PetSense that Tevra had just
8 received EPA registration for its generic Imidacloprid topical. In March 2017, Tevra made an
9 offer to PetSense with significant incentives to encourage PetSense to carry Tevra's generic
10 Imidacloprid topical. PetSense directed Tevra to discuss the sale of Tevra's product through the
11 distributor to PetSense. In discussions with the distributor, Tevra salespersons were told of the
12 existence of a "Bayer agreement," and were told that "they were going to let us know if the
13 agreement prohibits them from adding another Imidacloprid product."

14 151. PetSense ultimately refused to purchase and stock Tevra's generic Imidacloprid
15 topical.

16 152. An affiliate of PetSmart also told Tevra that Bayer was trying to "bundle" its
17 rebate program for both PetSmart and the affiliate. The affiliate then stopped negotiating with
18 Tevra, because of the Bayer rebate program. PetSmart and its affiliate ultimately refused to
19 purchase and stock Tevra's generic Imidacloprid topical.

20 153. After the original complaint was filed, Tevra continued to offer its generic
21 Imidacloprid topical product to online and pet specialty retailers at prices significantly lower
22 than those offered by Bayer. Online and pet specialty retailers continue to refuse to purchase
23 Tevra's generic Imidacloprid topicals.

24 154. At least two years after Bayer's "no generics" conspiracy with distributors and
25 retailers began, Jeriel Chua, now a global brand manager with BAH GmbH wrote, in a December
26 10, 2018 email to Imke Pickardt, also at BAH GmbH, [REDACTED]

27 [REDACTED] One of the attached documents was
28 called [REDACTED] stated that the [REDACTED]

1 [REDACTED] According to the
2 document, a [REDACTED] to a retailer needing [REDACTED] was

3 [REDACTED] In response to a retailer stating that it desires
4 more margin, the document states as a [REDACTED] that [REDACTED]

5 [REDACTED]

6 [REDACTED]
7 [REDACTED] It appears that Mr. Chua was quite proud of Bayer's strategy to
8 [REDACTED] as he described it two years earlier, which consisted of Bayer sharing its
9 monopoly profits with distributors and retailer, in exchange for their agreement to keep generic
10 competitors out, and retail prices high.

11 **3. Bayer's direct payments to remove generic competition**

12 155. A third strategy used by Bayer to block generic competition was the direct
13 payment of up to [REDACTED] to PetCo in exchange for PetCo removing products, including the
14 PetLock generic Imidacloprid topicals from its shelves.

15 156. Several Bayer documents confirm that this [REDACTED]
16 [REDACTED]
17 [REDACTED] and eliminated competition by generic Imidacloprid topicals in its stores. These
18 documents include emails requesting authorization of the payment to Petco and stating that
19 Bayer expected the [REDACTED]

20 [REDACTED]

21 157. A 2018 Bayer slide deck proclaimed that at [REDACTED]

22 [REDACTED]

23 158. Bayer also apparently made a similar deal with PetSmart, as shown by a Bayer
24 document that details both [REDACTED]

25 [REDACTED]

26 [REDACTED] The documents reads, in part:

27

28

1
2
3
4
5
6
7
8 **4. Bayer changed its Purchase Agreements to block generic entry**

9 159. A fourth strategy used by Bayer to block generic competition involved numerous
10 changes to its Purchase Agreement with retailers.

11 160. Most notably, Bayer introduced an [REDACTED] in which
12 it cut the price of a large bundle of Bayer products, including its “blockbuster” Seresto Flea
13 Collar, on the explicit condition that the retailers refuse to carry generic Imidacloprid topicals
14 that competed with Bayer’s higher-priced name brand topicals. It is important to note that the
15 discount did not just apply to the Imidacloprid topicals it was designed to protect, instead, it
16 applied to an entire bundle of Bayer products, making it even more lucrative for retailers to keep
17 generic competition out.

18 161. Bayer also changed its Purchase Agreements to punish retailers that allowed
19 generic products to state that they “compare to” Bayer products in store displays, webpages and
20 advertising. It rewarded retailers with higher discounts if, and only if, those retailers refused any
21 “compare to” placement of competing generics. Pet Supplies Plus actually agreed to carry a
22 generic Imidacloprid topical, but was unwilling to give up the lucrative discount on the entire
23 bundle of Bayer products, including the Seresto Flea Collar, and therefore would not allow the
24 generic to state that its products “compare to” Bayer products in any way. This restriction
25 severely handicapped the sale of the generic Imidacloprid topical at Pet Supplies Plus.

26 162. Not only do the Purchase Agreements require retailers and distributors to
27 purchase Bayer’s expensive Imidacloprid topicals, but they also include a series of discounts that
28 are aimed at preventing generic competitors from entering the market. Bayer includes multiple

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Discount	Range	Requirements
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

163. [REDACTED]
in some instances the anti-competitive discounts and rebates amount to approximately [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

164. The Purchase Agreements are not easily terminable by retailers or distributors. Bayer is a monopolist with at least 85% of sales in the relevant market—and effectively 100%, since Bayer receives royalties for most of the remaining 15% of sales. A retailer who terminates or violates its Purchase Agreement with Bayer risks losing the right to buy products that any pet specialty retailer must have to compete. That the Purchase Agreements are not easily terminable is further evident from the fact that none of Chewy.com, Drs. Foster & Smith (later PetCo.com), or PetMed Express, which represent over 75% of internet sales, nor PetCo, PetSense or PetSmart, which represent over 70% of pet specialty sales, ever terminated their Bayer contracts or withdrew from Bayer’s anti-competitive scheme to substantially foreclose generic Imidacloprid topicals during the years that Tevra has been trying to enter the market. Indeed, none of those six retailers ever agreed to purchase Tevra’s product.

1 165. The Purchase Agreements are also not easily terminable in part because retailers
2 and distributors refuse to terminate those agreements in fear that they would lose the
3 anticompetitive discounts and rebates on Bayer's products.

4 166. If a retailer were to not participate in Bayer's loyalty discount program, it could
5 not compete with retailers who do participate in the discount program. This is the case in part
6 because nearly every Purchase Agreement provided by Bayer makes clear that Bayer's
7 customers understand that every other retailer and distributor gets the same base price on Bayer's
8 products, and that discounts will be offered on an "equivalent basis": "[T]he list pricing offered
9 hereunder shall be Bayer's standard list pricing for all channels of trade. Opportunities for
10 Purchaser to qualify for Discounts and Rebates shall be offered on an equivalent basis." These
11 provisions are a written assurance given to Bayer's customers, who compete with one another,
12 that they will be getting the same base pricing on Bayer's products, and that discounts will be
13 offered on an "equivalent basis" as their competitors. The clause in the Bayer written
14 agreements that informs retailers and distributors that their competitors will get the same base
15 pricing is a warning to each retailer that they will be at a severe cost disadvantage if they do not
16 participate in the Bayer's anti-competitive scheme. Each retailer or distributor can see that its
17 competitors will be getting a very substantial discount that it will not receive if it does not
18 participate in Bayer's anti-competitive scheme. The discounts individually and collectively
19 permit Bayer to enforce its exclusive dealing by substantially foreclosing manufacturers of
20 generic Imidacloprid topicals. In addition, as discussed in this Second Amended Complaint,
21 retailers have told Tevra that they have entered into "no generics" agreements with Bayer. Bayer
22 has utilized these illegal agreements to maintain its monopoly in the relevant market and to
23 substantially foreclose generics from the relevant market.

24 167. Regardless of the stated length of the Purchase Agreements or their termination
25 clauses, the Purchase Agreements and the verbal no-generics agreements are not easily
26 terminable and effectively operate as *de facto* long-term exclusive dealing agreements with the
27 intent and effect to substantially foreclose generic manufacturers of Imidacloprid topicals from
28 the relevant market. Retailers cannot afford to cancel the Purchase Agreements or violate the no-

1 generics agreements in part because Bayer has market power in the relevant market, and, if
2 retailers were to terminate the Purchase Agreements, they would lose millions of dollars in
3 discounts on Seresto and other products. Further, and as mentioned above, Bayer can enforce the
4 “no generics” agreements through the terms of the Purchase Agreements, including but not
5 limited to terms stating to Bayer’s customers that they and their competitors receive the same
6 base pricing and that discounts will be offered on “an equivalent basis.” In addition, significant
7 barriers to entry into the Imidacloprid topical market exist. These barriers to entry include
8 Bayer’s anti-competitive conduct itself, which substantially forecloses generics from the market,
9 as well as Bayer’s monopoly of Imidacloprid topicals. These and other barriers to entry
10 substantially foreclose generics from the relevant market. Thus, the Purchase Agreements are
11 effectively sufficiently long term to foreclose competition, and are not easily terminable.
12 Through the Purchase Agreements and other understandings and agreements with retailers and
13 distributors, Bayer has foreclosed access to a substantial share of the relevant market by Tevra
14 and other generic manufacturers of Imidacloprid topicals.

15 168. Thus, the Purchase Agreements, the no-generics agreements, and related
16 understandings amount to long-term exclusive dealing agreements between Bayer and the
17 retailers and distributors. Due to the terms of the Purchase Agreements, Bayer’s market power
18 in Imidacloprid topicals, and the threat that it would discontinue discounts on Bayer’s
19 Imidacloprid topicals and other products, including the popular Seresto, retailers and distributors
20 cannot do business with generic manufacturers of Imidacloprid topicals. As a result of Bayer’s
21 ongoing anti-competitive conduct, there is no meaningful competition in the relevant market.

22 169. Not only do the Purchase Agreements contain anti-competitive exclusivity
23 discounts and otherwise amount to *de facto* exclusive dealing between Bayer and the retailers
24 and distributors, but, as set forth above, Bayer and multiple distributors and retailers have a
25 separate verbal understanding or agreement that retailers will not do business with generic
26 manufacturers of Imidacloprid topicals, as explained by the retailers themselves to Tevra.

5. Bayer succeeded in maintaining its monopoly and foreclosing competition through exclusive dealing

170. In 2016, Jeriel Chua, a brand manager for Advantage evaluated his own performance in blocking generic entry in the U.S. against one of Bayer's Imidacloprid topicals. His written comments in his own performance review include the following: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

171. Bayer's four-part strategy to maintain its monopoly and substantially foreclose generic competition from the market was remarkably successful. Bayer was able to maintain its monopoly and increase its prices and increase its profitability, despite the expiration of one of its patents and the loss of "exclusive use" of its EPA registration data. In doing, Bayer violated the Sherman Act and the Clayton Act, increased prices for consumers, and damaged its generic competitors, including Tevra, by substantially foreclosing them from the market.

172. Bayer's foreclosure of the market has been substantial, both in the share of the relevant market that has been foreclosed and in the length of time it has been foreclosed. The purchase agreements have been renewed by retailers who continue doing business today. Bayer's market foreclosure is effectively infinite, as retailers have no choice but to renew these contracts for fear of losing Bayer's anti-competitive discounts and rebates.

173. Imidacloprid topicals are sold in several different sales channels in the U.S., including pet specialty retailers, internet retailers, general retailers, veterinarians, direct-to-consumer sales, and other small channels, such as military sales. An August 2017 Bayer document explained it this way:

[REDACTED]

1 174. The same Bayer document gave Bayer's estimates for the [REDACTED] as
2 follows:

3 [REDACTED]
4 [REDACTED]

5 [REDACTED]

6 [REDACTED]
7 [REDACTED]

8 175. Exact sales data from all channels are not available, but fairly accurate estimates
9 can be made from publicly available data and some of Bayer's own documents. Based on the
10 best data available to it, including the Bayer estimates quoted above, Tevra has been foreclosed
11 from at least 56% of all sales of Imidacloprid topicals in the U.S., mostly in the two largest
12 channels, pet specialty retailers and internet retailers. However, the foreclosure in these largest
13 channels spilled over into other channels, particularly direct-to-consumer sales, since Tevra was
14 an "unknown" to these buyers, because it had no presence or visibility in the two largest
15 channels, pet specialty retailers and internet retailers. Tevra's foreclosure from distributors, as
16 noted in Section E.2 above, also kept it out of multiple channels that are served by those
17 distributors.

18 176. As set forth in Section E.2 above, Tevra has direct evidence of foreclosure from
19 three large internet retailers. Together, Retailers Chewy.com, Drs. Foster & Smith (now
20 Petco.com), and PetMed Express represent over 75% of Imidacloprid topical sales by internet
21 retailers. Bayer's agreements with these retailers have collectively foreclosed at least that share
22 of the internet sales channel, as these retailers are unwilling or unable to purchase generic
23 Imidacloprid products, even if the prices for such products are significantly lower than the prices
24 for Bayer's Imidacloprid topicals, for fear of violating Bayer's no-generics rule or losing Bayer's
25 anti-competitive discounts and rebates.

26 177. Also as set forth in Section E.2 above, Tevra has direct evidence of foreclosure
27 from three pet specialty retailers. Together, PetCo, PetSense, and PetSmart represent over 70%
28 of Imidacloprid topical sales by pet specialty retailers. Bayer's agreements with these retailers

1 have collectively foreclosed at least that share of pet specialty sales channel, as these retailers are
 2 unwilling or unable to purchase generic Imidacloprid products, even if the prices for such
 3 products are significantly lower than the prices for Bayer's Imidacloprid topicals, for fear of
 4 violating Bayer's no-generics rule or losing Bayer's anti-competitive discounts and rebates.

5 178. The percentage of the total market for Imidacloprid topical sales from which
 6 Tevra was foreclosed may be estimated as follows: In 2018, manufacturers sold approximately
 7 \$270 Million in Imidacloprid topicals in the U.S. Applying the [REDACTED] given by Bayer,
 8 as stated above, approximately 25% (about \$67.5M) was sold to veterinarians, with the
 9 remaining 75% (about \$202.5M) sold into what Bayer calls "OTV" or "Other Than Vet"
 10 channels, including pet specialty, internet, "multi-outlet" (also called MULO or Food, Mass,
 11 Drug), and other minor channels. Of the approximately \$202.5 Million that was sold into OTV,
 12 about 54% (\$109M) was bought by pet specialty retailers, about 21% (\$43M) was bought by
 13 internet retailers, and the remaining 25% (\$50M) was sold into other channels including MULO,
 14 direct-to-consumer, independent pet stores, and the distributors that serve these other channels.

15 179. Tevra was almost totally foreclosed from both the pet specialty and internet
 16 channels, which together represent just over 56% (\$152M) in total U.S. sales (all channels) in
 17 2018. As noted in Section E.2, Tevra was also foreclosed in some other channels because of
 18 Bayer's "no generics" conspiracy and contracts with distributors, who re-sell Imidacloprid
 19 topical into those channels. Ultimately, Tevra was foreclosed from competing for at least 56%
 20 of the total market for Imidacloprid sales in the U.S., and probably much more, due to Bayer's
 21 foreclosure of distributors.

22 **F. BAH GmbH actively participated in monopoly maintenance and exclusive**
 23 **dealing in the U.S.**

24 180. Bayer documents listed below demonstrate the systematic and ongoing
 25 involvement of BAH GmbH in helping to design and implement a [REDACTED] in
 26 the U.S. BAH GmbH Global Marketing was extremely worried about the threat that generic
 27 competition posed to Bayer's profits in the U.S. (Bayer's largest market), and its executives and
 28 staff participated in several levels of management committees in which U.S. generic defense was

1 discussed. These included the Strategic Leadership Team, the Global Brand Team, and the Key
2 Country Panel, all of which had both BAH GmbH members and BHC LLC members. In
3 addition, the yearly Straco (or Strategic Consensus) process was implemented and controlled by
4 BAH GmbH. That process required BHC LLC to provide BAH GmbH with detailed estimates
5 on expected market entry by manufacturers of generic Imidacloprid, and possible ways to
6 combat generic entry.

7 181. By 2013, BAH GmbH required BHC LLC to make monthly reports about competitive
8 conditions in the U.S. Oliver Aue, a Global Brand Manager at BAH GmbH, wrote to David
9 VanBrunt, and others at BHC LLC, as follows:

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 182. This message was later repeated and reinforced to the BHC LLC by Mario
14 Andreoli, the head of Global Marketing, for BAH GmbH, and the monthly reports on
15 competitive conditions, including generic entry, by BHC LLC to BAH GmbH Global Marketing
16 began.

17 183. In February 2014 a [REDACTED] was conducted between several
18 BAH GmbH executives, including Mario Andreoli, Tobias Boldt, Oliver Aue, Marc Stoeber, and
19 the BHC LLC managers in charge of marketing and selling Imidacloprid topicals in the U.S.
20 The Straco template provided by BAH GmbH required BHC LLC to provide detailed estimates
21 of when generic entry against Bayer's products was expected to occur in the U.S. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 184. Jeriel Chua, who was a U.S. brand manager for Imidacloprid topicals when he
25 worked for BHC LLC, and later transferred to Global Marketing responsibilities at BAH GmbH,
26 testified that [REDACTED]

27 [REDACTED] This is further
28 evidence that generic defense strategy was created and controlled on a global basis, including in

1 the U.S., by BAH GmbH.

2 185. By 2016, BAH GmbH was implementing what it called [REDACTED]
3 [REDACTED] led by Frank Rautenberg, a Global Pricing Excellence Manager. Since generic
4 entry and generic competition could have serious effects on the prices Bayer could obtain for its
5 products, BAH GmbH was deeply concerned with generic defense strategy. In 2017, Frank
6 Rautenberg sent an email to several Bayer executives, including Jeriel Chua, who had been the
7 U.S. brand manager for Bayer's Imidacloprid topicals. Mr. Rautenberg's email stated, in part:

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 186. On November 3 2016, David VanBrunt, a BHC LLC manager for Imidacloprid
12 topicals, reported to David Zapatero, a BAH GmbH executive in charge of global marketing for
13 Bayer's Imidacloprid topicals, as follows:

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [emphasis added].

18 187. In February 2017, BAH GmbH employees, including Jeriel Chua, who had been a
19 U.S. brand manager for Imidacloprid topicals when he worked for BHC LLC, met with the
20 Advantix "Global Brand Team" to discuss [REDACTED]
21 [REDACTED] It set the agenda for the next global brand team meeting, which was
22 explicitly to include [REDACTED] [REDACTED]

23 188. April 10, 2017, Imke Rottman, another Global Pricing Excellence Manager for BAH
24 GmbH, emailed several employees of BHC LLC who were responsible for marketing and sales
25 of Bayer's Imidacloprid topicals in the U.S. Her email read, in part:

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

[Emphasis added].

189. In a later email Imke Pickardt (formerly Imke Rottman) discussed generic defense strategy and second brands, as follows:

190. In September 2019, BAH GmbH made a presentation entitled

[REDACTED] This presentation explained the experience gained from using [REDACTED]

The presentation also mentioned the [REDACTED]

The presentation also mentioned a [REDACTED]

191. Accordingly, BAH GmbH took the generic defense strategies that it developed and used globally, particularly the second brands strategy, and applied them in the U.S., to help maintain Bayer's monopoly in Imidacloprid topical and to exclude generic competitors. It was an active participant in the violations of the Sherman Act and the Clayton Act described in this Second Amended Complaint.

G. Bayer possesses monopoly power in the relevant market.

192. Bayer possesses monopoly power in the relevant antitrust market, and has possessed that monopoly power at all times relevant to this Second Amended Complaint.

193. There is substantial direct evidence that Bayer possesses monopoly power.

194. Direct evidence of Bayer's monopoly power includes its demonstrated ability to

1 control price and exclude competition in the relevant market, as described in Sections A.d.1 and
2 E.

3 195. Because of its exclusionary conduct, Bayer has the ability to price Imidacloprid
4 topicals substantially higher than its generic competitors without losing customers.

5 196. Bayer can and does exclude competitors like Tevra from the relevant market.

6 197. Other direct evidence of Bayer's market power includes the lack of any
7 meaningful competition in the relevant market. As described in Sections D.2 and E, Tevra
8 cannot meaningfully compete with Bayer in the relevant market because retailers representing a
9 substantial share of the market are not willing or able to purchase Tevra's generic Imidacloprid
10 products, in fear that they will lose Bayer's anti-competitive discounts and financial incentives to
11 exclude generics.

12 198. There is also substantial indirect evidence that Bayer possesses monopoly power.

13 199. Bayer possesses extremely high market shares in the relevant market of at least
14 85%, and receives patent royalties for most of the other 15%.

15 **H. Anticompetitive Effects of Bayer's Conduct.**

16 200. Bayer's anti-competitive conduct substantially lessened competition and
17 maintained its monopoly in the relevant market for Imidacloprid topicals. It also had the
18 following anti-competitive effects:

- 19 a. Tevra, and other sellers of generic Imidacloprid topicals, were substantially
20 foreclosed from the market for Imidacloprid topicals.
- 21 b. Retailers were prevented from purchasing lower-cost, equally-effective, generic
22 Imidacloprid topicals.
- 23 c. Retailers were prevented from offering consumers a wider selection of
24 Imidacloprid topicals.
- 25 d. Consumers were prevented from purchasing lower-cost, more effective,
26 Imidacloprid topicals, causing them to pay higher prices, and
- 27 e. Consumers were denied choices of competing Imidacloprid topicals.

I. Lack of Pro-Competitive Justification for Bayer's Actions

201. There are no pro-competitive justifications for Bayer's conduct, which served only to preserve Bayer's monopoly and resulting profits. It does nothing to advance market efficiency or consumer welfare. To the contrary, Bayer's anti-competitive conduct has damaged competition, raised prices, and diminished choices for retailers, distributors, and consumers.

J. Antitrust Injury

202. Tevra has suffered injuries of the type that U.S. antitrust laws were intended to prevent, and those injuries flow directly and proximately from Bayer's illegal monopolization and exclusive dealing. Bayer's conduct reduced competition, and Tevra was injured by the reduction in competition.

203. Bayer's illegal monopolization and exclusive dealing substantially foreclosed Tevra from entering the relevant antitrust market for Imidacloprid topicals, thereby causing Tevra to lose prospective profits on the sale of its generic Imidacloprid topical.

204. Tevra was almost totally foreclosed from selling its products to pet specialty retailers and internet retailers, which purchased about 50% of all Imidacloprid topicals in 2018.

205. Tevra has been substantially foreclosed from entering the relevant antitrust market indefinitely, since Bayer (and its successor, Elanco) has been able to maintain both its verbal and written agreements with retailers.

206. Bayer's illegal conduct disrupts competition in the relevant market. Because Bayer has foreclosed at least 56% of the relevant antitrust market, even when Tevra offers significantly lower per-transaction prices, a substantial share of customers will not do business with Tevra. Because of Bayer's conduct, no competitor, including Tevra, can compete with Bayer. Bayer is enabled, free from competitive discipline, to continue to demand higher prices from its customers for Imidacloprid topicals. In turn, Bayer's anti-competitive conduct has resulted in the ultimate consumers being harmed by having to pay higher prices for Imidacloprid topicals.

207. Bayer's illegal conduct has succeeded in substantially foreclosing all meaningful competition from the relevant market and substantially lessened competition and tended to create

1 and maintain a monopoly, by keeping generic Imidacloprid topical manufacturers from selling to
 2 a substantial share of the relevant antitrust market.

3 **K. Tevra has attempted to mitigate its damages, without success.**

4 208. Tevra has made numerous attempts to mitigate its damages by selling its generic
 5 Imidacloprid topicals wherever, and to whomever, it can. Tevra has sold small quantities of its
 6 products to small independent pet stores, and has sold to general retailers wherever possible.

7 209. Tevra has also sold its products directly to consumers, through its own website
 8 and through Amazon. Unfortunately, direct-to-consumer sales can only reach a small subset of
 9 consumers that are willing to switch from pet specialty retailers like PetCo and major internet
 10 retailers like Chewy.com.

11 210. These direct-to-consumer sales also present significantly higher transactional
 12 costs, lower profit margins, and higher risks for Tevra and other manufacturers of generic
 13 Imidacloprid topicals than do sales to retailers and are therefore not cost efficient for Plaintiff or
 14 for other manufacturers of generic Imidacloprid topicals. Moreover, direct-to-consumer sales are
 15 more difficult for products, like Tevra's Imidacloprid topicals, that have been excluded from the
 16 largest internet and pet specialty retailers, rendering them "unknowns" to consumers.

17 **L. Tevra Has Been Damaged by Bayer's Anti-Competitive Conduct.**

18 211. Tevra was damaged by Bayer's anti-competitive conduct that foreclosed Tevra
 19 from selling generic Imidacloprid topicals to retailers, and caused it to lose the prospective
 20 profits it would have earned, as described in this Section of this Second Amended Complaint.

21 212. One way to estimate Tevra's lost profits caused by Bayer's illegal conduct is to
 22 compare Tevra's 2016 projections of its future sales of its generic Fipronil products and its
 23 generic Imidacloprid products to its actual sales of these products.

24 213. Tevra's 2016 projections of its future sales of its generic Fipronil products were
 25 conservative, and Tevra actually sold more generic Fipronil products than it projected, as shown
 26 in Table 3, below.

Year	Projected Fipronil Sales to Online Retailers	Actual Fipronil Sales to Online Retailers	Projected Fipronil Sales to Pet Specialty Retailers	Actual Pet Fipronil Sales to Pet Specialty Retailers
2017	\$85,179	\$61,322	\$133,093	\$190,505
2018	\$689,947	\$1,986,219	\$1,078,052	\$2,319,479
2019	\$1,294,716	Est. \$2M	\$2,023,011	Est. \$3M
TOTALS	\$2,069,841	\$4,047,541	\$3,234,156	\$5,448,662

Table 3 – Projected and Actual Wholesale Sales of Fipronil by Tevra

214. In 2016, Tevra also made projections of the future sales of its generic Imidacloprid products, using the same methodology and assumptions as its Fipronil sales projections. Tevra's projections, which should have been as accurate as its Fipronil projections, and the actual sales into the foreclosed markets, are set forth in Table 4, below.

Year	Projected Imidacloprid Sales to Online Retailers	Actual Imidacloprid Sales to Online Retailers	Projected Imidacloprid Sales to Pet Specialty Retailers	Actual Imidacloprid Sales to Pet Specialty Retailers
2017	\$5,016,213	\$119,040	\$4,859,458	\$413,979
2018	\$9,278,240	\$17,267	\$8,988,295	\$549,652
2019	\$13,823,310	Est. \$13,500	\$13,391,380	Est. \$506,925
2020	\$13,823,310	Est. \$13,500	\$13,391,380	Est. \$506,925
2021	\$13,823,310	Est. \$13,500	\$13,391,380	Est. \$506,925
TOTALS	\$55,764,433	Est. \$149,807	\$54,021,891	Est. \$2,484,406

Table 4 – Projected and Actual Wholesale Sales of Imidacloprid by Tevra.

215. If Tevra had actually sold the projected amount of Imidacloprid in 2017, 2018, 2019, 2020, and 2021, it would have made a total net profit, after the cost of goods sold and other expenses are deducted, of at least \$76,058,900.

216. Tevra is entitled to treble damages, totaling at least \$228,176,000, plus its attorney fees and the costs of this action.

CLAIMS FOR RELIEF

COUNT I

**UNLAWFUL MAINTENANCE OF A MONOPOLY, IN VIOLATION
OF § 2 SHERMAN ACT, 15 U.S.C. §2**

217. Tevra incorporates all other allegations in this Second Amended Complaint into Count I.

218. Bayer has a monopoly on the sale of Imidacloprid topicals in the U.S., and made approximately 85% of all sales in the relevant market in 2018.

219. At all relevant times, Bayer has had monopoly power in the United States in the sale of Imidacloprid topicals.

220. Bayer has willfully maintained its monopoly by means of its unlawful and anticompetitive exclusive dealing arrangements, extensive loyalty discounts aimed at preventing retailers and distributors from doing business with Bayer's competitors, other understandings or agreements with retailers and distributors, its generic defense and "2nd Brand" strategies, its verbal "no generics" agreements with retailers and distributors, direct payments to retailers to remove competitor products from the retailers' shelves, and changes to contracts with retailers to punish those who carried generic competitors to Bayer's products, and reward those who did not with discounts, growth bonuses, and trade funds. Collectively, Bayer's conduct, agreements, contracts, and understandings substantially foreclose the relevant market.

221. The effects of Bayer's monopoly have been to raise prices for both retailers and consumers, prevent the sale of lower cost, equally or more effective, competing products in the relevant market, to substantially foreclose competitors from access to the relevant market, to substantially lessen competition, and to create and maintain a monopoly in the relevant market.

222. Tevra has been damaged by Bayer's maintenance of its monopoly by being substantially foreclosed from selling its products in the relevant market and by losing profits it would have made, but for Bayer's unlawful maintenance of its monopoly.

WHEREFORE, Plaintiff Tevra requests the following judgments and damage awards against each Bayer defendant:

- 1 a. A declaration that Bayer has violated Section 2 of the Sherman Act, 15 U.S.C. §
- 2 2;
- 3 b. Damages in the amount of at least \$76,058,900, for lost profits and lost value of
- 4 the company, to be trebled pursuant to the Clayton Act § 4, 15 U.S.C. § 15 to a
- 5 total of at least \$228,176,700;
- 6 c. The costs of this action, including reasonable attorney fees; and
- 7 d. Such other relief as the Court finds just and equitable.

8 **COUNT II**
9 **CONTRACT, COMBINATION, OR CONSPIRACY IN RESTRAINT OF TRADE,**
10 **IN VIOLATION OF § 1 SHERMAN ACT, 15 U.S.C. §1**

11 **Exclusive Dealing**

12 223. Tevra incorporates all other allegations in this Second Amended Complaint into
13 Count II.

14 224. Bayer entered into contracts, combinations, or conspiracies in unreasonable
15 restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

16 225. Bayer's illegal agreements included, but were not limited to, (a) exclusive dealing
17 agreements with retailers and distributors that contain, among other things, a web of anti-
18 competitive loyalty discounts, with the intent and effect of substantially foreclosing the relevant
19 market and substantially foreclosing Tevra and other competitors from the relevant market; (b)
20 agreements or understandings between Bayer and its customers through which Bayer's
21 customers agreed not to purchase generic Imidacloprid products like Tevra's; and (c) other
22 agreements and understandings with retailers and distributors that operated to substantially
23 foreclose Tevra and other competitors from entering the relevant market.

24 226. Defendants' anti-competitive acts involved United States commerce, and had a
25 direct, substantial, and foreseeable effect on interstate commerce by raising prices for
26 Imidacloprid topicals and substantially foreclosing competitors from the relevant market in the
27 United States.

227. As a direct and proximate result of Bayer's anti-competitive conduct, Tevra has been injured in its business or property by being substantially foreclosed from the relevant market.

WHEREFORE, Plaintiff Tevra requests the following judgments and damage awards against each Bayer defendant:

- a. A declaration that Bayer has violated Section 1 of the Sherman Act, 15 U.S.C. § 1;
- b. Damages in the amount of at least \$76,058,900, for lost profits and lost value of the company, to be trebled pursuant to the Clayton Act § 4, 15 U.S.C. § 15 to a total of at least \$228,176,700;
- c. The costs of this action, including reasonable attorney fees; and
- d. Such other relief as the Court finds just and equitable.

COUNT III
EXCLUSIVE DEALING IN VIOLATION OF § 3 CLAYTON ACT, 15 U.S.C. § 14

228. Tevra incorporates all other allegations in this Complaint into Count III.

229. Bayer has engaged in substantial U.S. interstate commerce by selling goods, including Imidacloprid topicals, to distributors and retailers.

230. Bayer's anti-competitive conduct described in this Second Amended Complaint based the price of goods it sold, or discounts from, or rebates upon, such price, on the condition, agreement or understanding that the purchaser thereof shall not deal in the goods of a competitor, in violation of § 3 of the Clayton Act, 15 U.S.C. § 14.

231. One effect of the condition, agreement or understanding described in the paragraph immediately above, above, is to substantially lessen competition in a line of commerce and tend to create and maintain a monopoly in the relevant market.

232. Another effect of the condition, agreement or understanding, described in ¶ 230, above, was to foreclose Tevra from a substantial share of relevant market.

233. Tevra has been damaged by the exclusive dealing scheme by being substantially foreclosed from selling its products in the relevant market, and by losing profits it would have

1 made but for the exclusive dealing scheme.

2 **WHEREFORE**, Plaintiff Tevra requests the following judgments and damage awards
3 against each Bayer defendant:

- 4 a. A declaration that Bayer has violated the Clayton Act § 3, 15 U.S.C. § 14;
- 5 b. Damages in the amount of at least \$76,058,900, for lost profits and lost value of
- 6 the company, to be trebled pursuant to the Clayton Act § 4, 15 U.S.C. § 15 to a
- 7 total of at least \$228,176,000;
- 8 c. The costs of this action, including reasonable attorney fees; and
- 9 d. Such other relief as the Court finds just and equitable.

10 **JURY DEMAND**

11 Tevra hereby demands a trial by jury on all issues so triable.

12

13 Dated: March 29, 2021

Respectfully Submitted,

14 POL SINELLI LLP

15

16 By: /s/ Daniel D. Owen

17 Daniel D. Owen

18 Attorneys for Plaintiff

19 TEVRA BRANDS, LLC

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